(22,369)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 155.

HENRY FRIEND, SOLOMON C. MOSS, AND HENRY MORRIS, PETITIONERS,

vs.

JAMES TALCOTT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the circuit court of the United States for the northern district of Illinois	1	1
Placita	1	1
Præcipe for summons	2	1
Summons	3	2
Marshal's return	3	3
Declaration	4	3
Pleas	8	6
Order of March 27, 1906, granting leave to amend declaration	11	8
Additional counts to declaration	11	8
Order of March 30, 1906, that pleas to original declaration stand as pleas to additional counts	14	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1912.

	Original.	Print
Replication and demurrer to pleas	14	11
Order of January 29, 1907, sustaining demurrer to second and fourth pleas	15	12
Additional pleas	16	13
Decree of district court entered May 7, 1904, In the matter of Friend, Moss & Morris, bankrupts	18	15
Demurrer to additional plea	20	16
Order of February 26, 1907, overruling demurrer to additional plea	21	17
Replication to additional plea	21	17
Similiter to replications	23	18
Order of May 14, 1908, overruling motion to find issues on question of former adjudication for plaintiff	24	19
Finding of facts	24	19
Conclusions of law	28	22
Order of May 22, 1908, granting leave to file amendment to fifth plea	28	23
Amendment to plea	29	23
Judgment	30	24
Bill of exceptions	31	25
Order of February 1, 1904, adjudicating Henry Friend *et al.* bankrupts	31	25
Petition of bankrupts for confirmation of composition	32	26
Order of March 12, 1904, referring petition for confirmation to master	33	27
Appearance of James Talcott	34	27
Specifications of objections of James Talcott to petition for confirmation of composition	35	28
Exceptions of James Talcott to report of special master	36	29
Order of May 7, 1904, overruling exceptions to master's report	37	29
Report of special master of April 26, 1904	38	30
Order of April 26, 1904, approving special master's report	40	32
Petition for writ of error	41	33
Assignment of errors	43	34
Order of June 19, 1908, allowing writ of error	44	35
Bond on writ of error	44	36
Writ of error	46	37
Return to writ of error	47	37
Præcipe for transcript	48	38
Clerk's certificate	48	39
Citation	49	39
Certificate of clerk of United States circuit court of appeals to printed record	50	40
Appearance of counsel for plaintiff in error	51	40
Appearance of counsel for defendants in error	52	41
Order of January 5, 1909, setting cause for hearing	53	41
Hearing and cause taken under advisement	54	42
Opinion	55	43
Order of December 4, 1909, reversing judgment and remanding cause for further proceedings	62	48

	Original.	Print
Order of January 3, 1910, extending time for filing petition for rehearing	63	49
Petition for rehearing, filed January 13, 1910 (not copied)	63	49
Order of February 2, 1910, extending time for filing answer to petition for rehearing	64	49
Order of February 18, 1910, extending time for filing answer to petition for rehearing	65	50
Order of June 10, 1910, denying petition for rehearing	65	50
Certificate of clerk of United States circuit court of appeals to supplemental record	66	51
Writ of certiorari and return	68	52

a In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1511.

JAMES TALCOTT, Plaintiff in Error,
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS, Defendant-in Error.

Mr. Horace Kent Tenney, Mr. M. Lester Coffeen, Mr. Charles F. Harding, Mr. Roger Sherman, Counsel for Plaintiff in Error.
Mr. Jacob Newman, Mr. S. O. Levinson, Mr. B. V. Becker, Mr. C. E. Cleveland, Mr. Harry Goodman, Mr. A. B. Schaffner, Counsel for Defendant- in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1 *Placita.*

Pleas in the Circuit Court of the United States for the Northern District of Illinois—Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Friday, the twenty-second day of May, in the year of our Lord one thousand nine hundred and eight, being one of the days of the regular December Term of said Court, begun Monday, the sixteenth day of December, 1907, and of our independence the one hundred and thirty-second year.

H. S. STODDARD, *Clerk.*

2 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

27,716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Præcipe for Summons, Filed April 27, 1905.

Be it remembered, That on this day to-wit: the twenty-seventh day of April, 1905, come the plaintiff in the above entitled cause by his attorneys, Messrs. Tenney, Coffeen, Harding and Wilkerson and filed in the clerk's office of said Court his certain Præcipe, praying the issuance of Summons. Which said Præcipe is in the words and figures following to-wit:

Præcipe for Summons.

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

Circuit Court, March Term, A. D. 1905.

In Case 27,716.

Damages $3,000.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

The Clerk of said Court will issue a Summons in said cause to said defendants, in a plea of trespass on the case to the damage of said plaintiff in the sum of three thousand dollars direct the same to the United States Marshal for said District to execute, and make it returnable to the July term of said Court, 1905.

Dated this 27th day of April, A. D. 1905.

TENNEY, COFFEEN, HARDING & WILKERSON,
Plaintiff's Attorneys.

To Marshall E. Sampsell, Esq., Clerk.

(Endorsed:) Filed April 27, 1905. Marshall E. Sampsell, Clerk.

3 *Summons, Issued April* 27, 1905.

And on the same day to-wit: the twenty-seventh day of April, 1905, there issued out of clerk's office of said Court, in said entitled cause a certain summons. Which said summons together with the Marshal's return thereon endorsed is in the words and figures following to-wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to the Marshal of the Northern District of Illinois, Greeting:

We Command You to Summons Henry Friend, Solomon C. Moss and Henry Morris, if found in your District, to be and appear before our Judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of July next, to answer unto James Talcott, of a plea of trespass on the case to his damage, as is alleged, of Three thousand ($3,000.00) Dollars, and have you then and there this Writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 27th day of April, in the year of our Lord one thousand nine hundred and five and of our independence the 129th year.

[SEAL.] MARSHALL E. SAMPSELL, *Clerk.*

Marshal's Return.

I have served this writ within my district in the following manner to-wit:

Upon the within named Henry Friend, by reading the same to and within his presence and hearing at Chicago on the 28th day of April, A. D. 1905.

Upon the within named Solomon C. Moss, by reading the same to and within his presence and hearing at Chicago on the 28" day of April, A. D. 1905.

Upon the within named Henry Morris by reading the same
4 to and within his presence and hearing at Chicago, Ills., on April 29", A. D. 1905.

JOHN C. AMES,
U. S. Marshal.
By H. B. COY,
Dep. U. S. Marshal.

(Endorsed:) Filed May 3, 1905. Marshall E. Sampsell, Clerk.

Declaration, Filed June 23, 1905.

And afterwards to-wit: on the twenty-third day of June, 1905, come the plaintiff in said entitled cause by his solicitor and filed in the clerk's office of said court his certain declaration in the words and figures following to-wit:

Declaration.

In the United States Circuit Court. Northern District of Illinois.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

James Talcott, a citizen of the United States and of the State of New York, plaintiff, by Tenney, Coffeen, Harding & Wilkerson, his attorneys, complains of Henry Friend, Solomon C. Moss and Henry Morris, citizens and residents of the Northern District of Illinois, of a plea of trespass on the case.

For that whereas, the plaintiff heretofore, to-wit: on the 21st day of January, 1903, was engaged in business as a dry goods commission merchant in the city of New York, in the State of New York, and the defendants were engaged in business as merchants in the

city of Chicago, in the state of Illinois, under the firm name and style of Friend, Moss & Morris, and the Woods Dry Goods Commercial Agency was a commercial agency engaged in the business, in the city of New York and elsewhere, of receiving statements of the financial condition of persons applying for the purchase of
5 goods upon credit and to be communicated to those from whom said persons seeking to purchase goods on credit might seek credit, which fact was then and there known to the defendants.

Plaintiff further avers that on, to-wit: the 21st day of January, 1903, to-wit: at the district aforesaid said defendants made a statement to said Woods Dry Goods Commercial Agency with reference to the financial condition of said firm of Friend, Moss & Morris, which statement was intended by them to be communicated by said Woods Dry Goods Commercial Agency to those who might thereafter make inquiry with reference to the financial condition of said firm of Friend, Moss & Morris and to be acted upon by those to whom it might be so communicated, whom the defendants might thereafter request to sell them goods on credit; that in and by said statement said defendants stated and represented that on the 31st day of December, 1902, said firm of Friend, Moss & Morris had total assets of $192,583.08 and total liabilities amounting to $99,594.13, and had a net surplus, over and above all debts and liabilities, amounting to $92,988.95.

Plaintiff further avers that said Woods Dry Goods Commercial Agency, thereafter, to-wit: on February 5, 1903, communicated said statement to him for the purpose of being acted upon by him in selling goods on credit to said defendants; that he relied upon said representations therein made and believed them to be true, and thereafter on divers dates sold and delivered to the defendants goods upon credit; and that for a portion of said goods so sold and delivered, to-wit: goods sold and delivered between June 1, 1903 and January 1, 1904, the defendants have failed to pay the plaintiff a part of the purchase price, and that there now remains unpaid thereon a large sum of money, to-wit: the sum of $3,000.

Plaintiff further avers that said statements and representations were false and fraudulent and were known to be so by the defendants at the time they were made as aforesaid; that said firm of Friend, Moss & Morris did not have, on the 31st day of December, 1902, assests amounting to $192,583.08; that their liabilities on said date largely exceeded $99,594.13; that they did not have a net surplus over and above their debts and liabilities amounting to $92,988.95; and that said firm of Friend, Moss & Morris was then, and continued to be during the time when the plaintiff sold and delivered
6 goods to the defendants, as aforesaid, wholly insolvent. To the damage of plaintiff of $3,000.

And For That Whereas, also, the plaintiff heretofore, to-wit: on the 21st day of January, 1903, was engaged in business as a dry goods commission merchant in the city of New York, in the state of New York, and the defendants were engaged in business as merchants in the city of Chicago, in the state of Illinois, under the firm name and style of Friend, Moss & Morris, and the Woods Dry Goods Com-

mercial Agency was a commercial agency engaged in the business, in the City of New York and elsewhere, of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to me communicated to those from whom said persons seeking to purchase goods on credit might seek credit, which fact was then and there known to the defendants.

Plaintiff further avers that on, to-wit: the 21st day of January, 1903, to-wit: at the district aforesaid, said defendants made a statement to said Woods Dry Goods Commercial Agency with reference to the financial condition of said firm of Friend, Moss & Morris, which statement was intended by them to be communicated by said Woods Dry Goods Commercial Agency to those who might thereafter make inquiry with reference to the financial condition of said firm of Friend, Moss & Morris and to be acted upon by those to whom it might be so communicated, whom the defendants might thereafter request to sell them goods on credit; that in and by said statement said defendants stated and represented that on the 31st day of December, 1902, said firm of Friend, Moss & Morris had a net surplus, over and above all debts and liabilities amounting to more than $90,000.

Plaintiff further avers that said Woods Dry Goods Commercial Agency thereafter, to-wit: on February 5, 1903, communicated said statement to him for the purpose of being acted upon by him in selling goods on credit to said defendants; that he relied upon said representations therein made and believed them to be true, and thereafter, on divers dates, sold and delivered to the defendants goods upon credit; and that for a portion of said goods so sold and delivered, to-wit: goods sold and delivered between June 1, 1903 and January 1, 1904, the defendants have failed to pay the plaintiff a part of the purchase price, and that there now remains unpaid thereon
7 a large sum of money, to-wit: the sum of $3,000.

Plaintiff further avers that said statements and representations were false and fraudulent and were known to be so by the defendants at the time they were made as aforesaid; that said firm of Friend, Moss & Morris did not have, on the 31st day of December, 1902, a net surplus, over and above its debts and liabilities, amounting to more than $90,000; and that said firm of Friend, Moss & Morris was then, and continued to be during the time when the plaintiff sold and delivered to the defendants goods as aforesaid, wholly insolvent. To the damage of plaintiff in sum of $3,000.

And For That Whereas, also, the plaintiff heretofore, to-wit: on the 21st day of January, 1903, was engaged in business as a dry goods commission merchant in the city of New York and State of New York, and the defendants were engaged in business in Chicago in the State of Illinois under the firm name and style of Friend, Moss & Morris, and the defendants, at the time aforesaid to-wit, at the district aforesaid, requested the plaintiff to sell and deliver to them on credit goods which they might from time to time thereafter order, and the defendants, for the purpose of inducing the plaintiff to so extend credit to them and to sell and deliver to them goods upon credit then and there stated and represented to him that on the

31st day of December, 1902, said firm of Friend, Moss & Morris had a net surplus of more than $90,000, over and above its debts and liabilities, invested in its business.

Plaintiff further avers that he relied upon such statements and representations and believed them to be true, and on divers dates thereafter sold and delivered to the defendants goods upon credit, and that for a portion of said goods so sold and delivered, to-wit: goods sold and delivered between June 1, 1903 and January 1, 1904, the defendants have failed to pay to the plaintiff a part of the purchase price, and that there now remains unpaid thereon the sum of, to-wit: $3,000.

Plaintiff further avers that said statements and representations were false and fraudulent and were known to be so by the defendants when made; that said firm of Friend, Moss & Morris did not have, on December 31, 1903, a net surplus of more than $90,000 over and above its debts and liabilities, and that said firm was then, and continued to be during the time when the plaintiff sold and de-
8 livered goods to the defendant, as aforesaid wholly insolvent.

To the damage of plaintiff of $3,000. And therefore he brings suit, etc.

TENNEY, COFFEEN, HARDING & WILKERSON,
Attorneys for Plaintiff.

(Endorsed:) Filed June 23, 1905, Marshall E. Sampsell, Clerk.

And afterwards to-wit: on the fourteenth day of July, 1905, come the defendants in said entitled cause by their attorneys and filed in the clerk's office of said court their certain Pleas in the words and figures fol-owing to-wit:

Pleas. Filed July 14, 1904.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 27716.

HENRY FRIEND, SOLOMON C. MOSS and HENRY MORRIS
ads.
JAMES TALCOTT.

Pleas.

1. And the defendants, by Newman, Northrup, Levinson, & Becker, their attorneys, come and defend the wrong and injury, when, etc., and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them, in manner and form as the plaintiff has above thereof complained against them, and of this they put themselves upon the country, etc.

2. And for a further plea in this behalf, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid

action against them because they say that after the committing of the said supposed several grievances in the said declaration mentioned, and before the commencement of this suit and on to-wit: the first day of February, A. D. 1904, in certain proceedings in bankruptcy then pending in the District Court of the United States for the Northern District of Illinois, they were by said court duly adjudged bankrupt within the intent and meaning of the
9 acts of Congress relating to bankruptcy, of which proceedings the said plaintiff then and there had notice, and thereafter to-wit: on the seventh day of May, 1904, an order was entered therein by the said District Court confirming a composition offered by the said defendants to their creditors under and pursuant to the said Acts of Congress; by means whereof, and by force of the statute in such case made and provided the said defendants were then and there discharged of and from all their provable debts except those required to be paid by the terms of such composition, and except such debts as are by law excepted from the operation of a discharge in bankruptcy and the said defendants further aver that the said supposed causes of action in the said declaration mentioned, and each of them, are provable debts under the Acts of Congress relating to bankruptcy, and that they are not nor is any or either of them such a debt as is by law excepted from the operation of a discharge in bankruptcy; and the said defendants further aver that the said plaintiff proved his claim in said bankruptcy proceedings arising upon the said supposed causes of action in the said declaration mentioned, which said claim was allowed by said District Court, and thereafter the plaintiff received under and pursuant to the said composition all moneys and other considerations provided to be paid to him by the terms of said composition, and this, the said defendants are ready to verify, wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action against them, etc.

3. And for a further plea in this behalf the said defendants say that the plaintiff ought not to have or maintain his aforesaid action against them, because they say that after the committing of the said several supposed grievances in the said declaration mentioned, and before the commencement of this suit, to-wit: on the eighth day of May, 1904, the said defendants delivered to the said plaintiff, and the said plaintiff accepted of them the said defendants, two certain promissory notes made by said defendants to the order of said plaintiff, each for the sum of $372.57, bearing date May 7, 1904, one due four months after date, and the other due six months after date, and endorsed by L. Freiburger and Louis Morris, together with the sum of $298.05 lawful money of the United States of America, in full payment, satisfaction and discharge of the supposed causes of action in the said declaration mentioned, which said promissory notes upon the maturity thereof and before the commence-
10 ment of this suit, were fully paid; and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them.

4. And for a further plea in this behalf the defendants say that

the plaintiff ought not to have or maintain his aforesaid action against them, because they say that after the committing of the supposed grievances in the said declaration mentioned, and before the commencement of this suit, and on to-wit: the first day of February A. D. 1904, in certain proceedings in bankruptcy then pending in the District Court of the United States for the Northern District of Illinois, they were by said Court duly adjudged bankrupt within the intent and meaning of the Acts of Congress relating to Bankruptcy; that the said plaintiff entered his appearance in said bankruptcy proceedings and filed therein his claim in the sum of $3204.91 on account of the said goods supposed to have been sold and delivered by him to these defendants as in the said declaration mentioned, which claim was allowed by said District Court; and thereafter to-wit: on the seventh day of May, 1904, an order was entered by said District Court confirming a composition offered by said defendants to their creditors under and pursuant to the said Acts of Congress and thereafter to-wit: on the 8th day of May, 1904, the said claim of said plaintiff was paid according to the terms of said composition, and the said plaintiff accepted the said payment. And this the defendants are ready to verify.

Wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action.

NEWMAN, NORTHRUP, LEVINSON & BECKER,
Attorneys for Defendants.

(Endorsed:) Filed July 14, 1905, Marshall E. Sampsell, Clerk.

And afterwards to-wit: on the twenty-seventh day of March, 1906, being one of the days of the Regular December term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

11 *Order of March 27, 1906.*

Leave to Amend Declaration.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Now come the parties by their attorneys and thereupon leave is given the plaintiff to amend the declaration herein by filing additional counts instanter, and the defendants are ruled to answer the same within five days.

And on the same day to-wit: the twenty-seventh day of March, 1906, come the plaintiff in said entitled cause by his attorneys and by leave of court first had and obtained filed in the clerk's office of

said court his certain additional counts to declaration in the words and figures following to-wit:

Additional Counts to Declaration. Filed March 27, 1906.

In the Circuit Court of the United States for the Northern District of Illinois.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Additional Counts to Declaration.

And the plaintiff, James Talcott, by leave of court, further complains of the defendants, Henry Friend, Solomon C. Moss and Henry Morris, of a plea of trespass on the case.

I.

For That Whereas, the plaintiff, heretofore, to-wit: on the 21st day of January, 1903, was engaged in business as a dry goods commission merchant in the city of New York, in the State of New York, and the defendants were engaged in business as merchants in the city of Chicago, in the State of Illinois, under the firm name and style of Friend, Moss & Morris; and the Woods Dry Goods Commercial Agency was a commercial agency engaged in the business, in the city of New York and elsewhere, of receiving statements of the financial condition of persons applying for the purchase
12 of goods upon credit, and to be communicated to those from whom said persons seeking to purchase goods on credit might seek credit, which fact was then and there known to said defendants.

Plaintiff further avers that on to-wit, the 21st day of January, 1903, at, to-wit: the district aforesaid, said defendants made a statement to said Woods Dry Goods Commercial Agency with reference to the financial condition of said firm of Friend, Moss & Morris, which statement was intended by them to be communicated by said Woods Dry Goods Commercial Agency to those who might thereafter make inquiry with reference to the financial condition of said firm of Friend, Moss & Morris, and to be acted upon by those to whom it might be so communicated whom the defendants might thereafter request to sell them goods upon credit. That in and by said statement said defendants stated and represented that on the 31st day of December, 1902, said firm of Friend, Moss & Morris had total assets amounting to $192,583.08; that they then owed on account of liabilities for merchandise $87,594.13, and on account of other liabilities than liabilities for merchandise the sum of $12,000; and that their total liabilities amounted to $99,594.13.

Plaintiff further avers that said Woods Dry Goods Commercial

Agency thereafter, on to-wit: February 5, 1903, communicated said statement to him for the purpose of being acted upon by him in selling goods on credit to said defendants; that he relied upon said representations therein made and believed them to be true, and thereafter on divers dates sold and delivered to the defendants goods upon credit. And that for a portion of said goods so sold and delivered, to-wit: goods sold and delivered between June 1st, 1903 and January 1, 1904, the defendants have failed to pay the plaintiff a part of the purchase price, and that there now remains unpaid thereon a large sum of money, to-wit: the sum of $3,000.00.

Plaintiff further avers that said statements and representations so made by the defendants as aforesaid are false and fraudulent, and were known to be false and fraudulent by said defendant at the time they were made as aforesaid.

That said firm of Friend, Moss & Morris did not on the said 31st day of December, 1902, have assets amounting to $192,583.08, and that they owed on account of liabilities other than liabilities for merchandise a sum largely in excess of $12,000.00; that their total liabilities largely exceeded $99,594.13; to the damage of plaintiff of $3,000.00.

13 II.

And For That Whereas, the plaintiff heretofore, to-wit: on the 21st day of January, 1903, was engaged in business as a dry goods commission merchant in the city of New York, in the State of New York, and the defendants were engaged in business as merchants in the city of Chicago, in the State of Illinois, under the firm name and style of Friend, Moss & Morris, and said defendants at the time aforesaid, to-wit: at the district aforesaid, requested the plaintiff to sell and deliver to them on credit goods which they might from time to time order. And said defendants, for the purpose of inducing said plaintiff to extend credit to them and to sell and deliver to them goods upon credit, then and there stated and represented to him that on the 31st day of December, 1902, said firm of Friend, Moss & Morris had total assets amounting to $192,583.08; that the liabilities of said firm for merchandise amounted to $87,593.13; that the liabilities of said firm other than liabilities for merchandise amounted to $12,000; that the total liabilities of said firm amounted to $99,594.13.

Plaintiff further avers that he relied upon said statements and representations and believed them to be true, and on divers dates thereafter sold and delivered to said defendants goods upon credit; and that for a portion of said goods so sold and delivered, to-wit: goods sold and delivered between June 1, 1903 and January 1, 1904, the defendants have failed to pay said plaintiff a part of the purchase price, and that there now remains unpaid thereon the sum of, to-wit: $3,000.00.

Plaintiff further avers that said statements and representations so made by said defendants as aforesaid were false and fraudulent, and were known to be false and fraudulent by said defendants when made by them as aforesaid; that said firm of Friend, Moss & Morris did not have on said 31st day of December, 1902, total assets

amounting to $192,583.08; that its liabilities other than liabilities for merchandise were largely in excess of $12,000.00. and that its total liabilities were largely in excess of the sum of $99,594.13. To the damage of plaintiff of $3,000.00, and therefore he brings suit, etc.

TENNEY, COFFEEN, HARDING & WILKERSON,
Attorneys for Plaintiff.

(Endorsed:) Filed March 27, 1906, Marshall E. Sampsell, Clerk.

14 And afterwards to-wit: on the thirtieth day of March, 1906, being one of the days of the regular December term of said court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

Order of March 30, 1906.

Pleas filed to original declaration to stand as pleas to the additional counts to declaration.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Upon motion of attorneys for defendants, it is ordered that the pleas heretofore filed by said defendants to the original declaration, stand as pleas to the additional counts filed by plaintiff on the 27th day of March, 1906.

Replication and Demurrer to Pleas, Filed Jan. 4, 1907.

And afterwards to-wit: on the fourth day of January, 1907, come the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said court his certain replication and demurrer to pleas in the words and figures following to-wit:

Replication and Demurrer to Pleas.

In the Circuit Court of the United States for the Northern District of Illinois.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

And the plaintiff, as to the plea of the defendants by them firstly above pleaded, wherein they put themselves upon the country, doth the like.

And the plaintiff, as to the second plea of said defendants, says that the same is insufficient in law, and this the plaintiff is ready to verify, wherefore he prays judgment, etc.

15 And the plaintiff, as to the third plea of the defendant, says that he ought not to be barred in maintaining his aforesaid action by reason of anything in that plea contained, because he says that he, the said plaintiff, did not accept from said defendants the said notes and sums of money in said plea mentioned in full payment, satisfaction and discharge of the causes of action in said declaration mentioned, and this the plaintiff prays may be inquired of by the country, etc.

And the plaintiff, as to the fourth plea of the defendant, says that the same is insufficient in law, and this the plaintiff is ready to verify, wherefore he prays judgment, etc.

TENNEY, COFFEEN, HARDING & WILKERSON,
Attorneys for Plaintiff.

I hereby certify that the demurrer of the plaintiff to the second and fourth pleas of the defendant is, in my opinion, well founded in point of law.

JAMES H. WILKERSON,
Of Counsel for Plaintiff.

(Endorsed:) Filed Jan. 4, 1907, Marshall E. Sampsell, Clerk.

Order of Jan. 29, 1907.

And afterwards to-wit: on the twenty-ninth day of January, 1907, being one of the days of the regular December term of said court, 1906, in the record of proceedings thereof, in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Order of January 29, 1907.

Demurrer to second and fourth pleas sustained, defendant to file additional pleas within five days.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Now again come the parties by their attorneys, and now comes on to be further heard the demurrer to the second and fourth pleas, and the Court, having heard the arguments of counsel to conclusion and being now fully advised in the premises, sustains said demurrer with leave to the defendant to file additional pleas within five days.

16 *Additional Pleas, Filed Feb.* 2, 1907.

And afterwards to-wit: on the second day of February, 1907, come the defendants in said entitled cause by their attorneys and by leave of court first had and obtained filed in the clerk's office of said Court their certain additional pleas in the words and figures following to-wit:

Additional Pleas.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 27716.

HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS, Defendants, ads.
JAMES TALCOTT, Plaintiff.

Additional Plea Filed by Leave of Court First Had and Obtained.

5. And for a further plea in this behalf to the whole of the plaintiff's said declaration, the defendants say that the said plaintiff ought not to have or maintain his aforesaid action against them, because they say that the several supposed causes of action in the said declaration and in the several counts thereof mentioned, are one and the same cause of action and not other or different causes of action, to-wit: the supposed cause of action in the first count of said declaration alleged. And the defendants further aver that after the making of the said supposed statement in writing in the said first count of said declaration mentioned, and before the commencement of this suit, and on to-wit: the first day of February A. D. 1904, an order was duly entered of record in certain proceedings in bankruptcy then pending in the District Court of the United States for the Northern District of Illinois against these defendants adjudicating these defendants bankrupt within the intent and meaning of the Acts of Congress relating to bankruptcy, of which proceedings said plaintiff then and there had notice, and there-

17 after the said plaintiff entered his appearance in said bankruptcy proceedings and filed therein his claim in the sum of Thirty-two hundred and four dollars and ninety-one cents ($3,204.-91) on account of the said goods supposed to have been sold and delivered by him to these defendants as in the said declaration mentioned, which said claim was allowed by said District Court for said sum of Thirty-two hundred and four dollars and ninety-one cents ($3,204.91), and the defendants further aver that thereafter in said bankruptcy proceedings, they offered terms of composition to their creditors, which terms were accepted in writing by a majority in number of all creditors whose claims had been allowed, which number represented a majority in amount of such claims, and that on to-wit: the 12th day of March 1904, the said defendants

filed in said District Court their petition as required by law for the confirmation of said composition; that the said plaintiff thereafter on to-wit: the 24th day of March 1904 entered his appearance in opposition to the confirmation of said composition, and thereafter on the 2nd day of April 1904 filed certain specifications of objections to the confirmation of said composition, and in said specifications of objections alleged among other things as follows:

"That said bankrupts obtained from said James Talcott and from other creditors property upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining such property upon credit; that said statement was so made on or about the 21st day of January 1903, to Woods Dry Goods Commercial Agency, which, as said bankrupts knew, was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to be communicated to those from whom they sought such credit; that said statement was duly communicated to said James Talcott and to others by said Commercial Agency for the purpose of being acted upon by them in selling goods to said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon said statement; that by the statement so made in writing by said bankrupts it was averred that they had a net surplus on January 1st, 1903, of ninety-two thousand nine hundred and eighty-eight and 95/100 dollars over and above all debts and liabilities,
18 whereas, in truth and in fact, they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time said statement was made, but were not know- to said James Talcott and other *other* creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition in bankruptcy herein."

which said supposed statement in writing so averred in said specifications of objections is the same supposed statement alleged in the first count of plaintiff's said declaration. And the defendants further aver that thereafter to-wit: on the 7th day of May the said petition for confirmation of composition and the said specifications of objections coming on to be heard before said District Court, the said District Court entered of record a final decree confirming said composition in the words and figures following:—

Decree of District Court, Entered May 7, 1904.

"In the District Court of the United States for the Northern District of Illinois, Saturday, May 7th, A. D. 1904.

Present, the Hon. Christian C. Kohlsaat, Judge.

10050.

In re FRIEND, MOSS & MORRIS, Bankrupts.

This matter coming on to be heard on the exceptions to the report of Referee F. L. Wean on the objections to the confirmation of the composition agreement entered into herein, come the parties by their solicitors, and after arguments of counsel the Court being fully advised in the premises overrules said exceptions and approves said report. And it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered, in such place as was designated by the Judge of said Court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge, and that the offer and
19 its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the acts of Congress relating to Bankruptcy; it is therefore ordered

Ordered that the said composition be and it is hereby *is* confirmed. It is hereby further

Ordered and decreed that the distribution of the deposit shall be made by the Clerk of the Court as follows, to-wit:

1st. To pay the several claims which have priority;

2nd. To pay the costs of proceedings;

3rd. To pay, according to the terms of the composition, the serveral claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

To which orders of the Court the Pontoosuc Woolen Manufacturing Co. and James Talcott, jointly, by their solicitors, duly except, and enter their motion for an appeal from said order to the United States Circuit Court of Appeals for the Seventh Circuit; whereupon the Court fixes the amount of the appeal bond at the sum of Fifty thousand Dollars ($50,000.)" which said decree so entered on said 7th day of May 1904 is still in full force and effect. And the defendants further aver that it is provided in Section 14*b* of the Act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, as amended February 5, 1903, that it shall be a bar to the discharge of any bankrupt if he has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining

such property on credit. Wherefore the defendants aver that all the matters and things in the said declaration alleged have been already litigated in and adjudicated by the said District Court of the United States for the Northern District of Illinois. And this the defendants are ready to certify; Wherefore they pray judgment whether the plaintiff ought to have or maintain his aforesaid action.

NEWMAN, NORTHRUP, LEVINSON & BECKER,
Attorneys for Defendants.

(Endorsed:) Filed Feb. 2, 1907, Marshall E. Sampsell, Clerk.

20 *Demurrer to Additional Plea, Filed Feb.* 11, 1907.

And afterwards to-wit: on the eleventh day of February, 1907, come- the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said court his certain demurrer to the fifth or additional plea. Which said demurrer is in the words and figures following to-wit:

Demurrer to the Additional Plea.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

And the plaintiff, as to the fifth plea of the defendants filed on Feb. 2, 1907, says that the same is insufficient in law, and this the plaintiff is ready to verify, wherefore he prays judgment, etc.

TENNEY, COFFEEN, HARDING & WILKERSON,
Attorneys for Plaintiff.

I hereby certify that the demurrer of the plaintiff to the fifth plea of the defendants is, in my opinion, well founded in point of law.

JAMES H. WILKERSON,
Of Counsel for Plaintiff.

(Endorsed:) Filed Feb. 11, 1907, Marshall E. Sampsell, Clerk.

And afterwards to-wit: on the twenty-sixth day of ebruary, 1907, being one of the days of the regular December term of said court, 1906, in the record of proceedings thereof, in said entitled cause before the Hon. K. M. Landis, District Judge, appears the following entry to-wit:

21 *Order of February 26, 1907, Demurrer to Additional Plea Overruled, Leave Given Plaintiff to Reply Double in Twenty Days.*

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

The court having considered and being now fully advised in the premises overrules the demurrer to the defendants' additional plea, and leave is given the plaintiff to reply double in twenty days.

Replication to Additional Plea, Filed May 20, 1907.

And afterwards to-wit: on the twentieth day of May, 1907, come the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said court his certain replication to the additional plea of the defendants in words and figures following to-wit:

Replication to Additional Plea.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Replication of Plaintiff to Additional Plea of the Defendants.

And the plaintiff, as to the additional plea of the defendants filed herein and described as the fifth plea of said defendant, says that he ought not to be barred from having his aforesaid action by reason of anything in that plea contained, because he says
22 that the matters and things in said declaration alleged were not litigated in and adjudicated by said District Court of the United States, for The Northern District of Illinois, in said proceedings mentioned in said plea, in manner and form as therein set forth, and this the plaintiff prays may be inquired of by the country, etc.

And the plaintiff, as to the additional plea of the defendants filed herein and described as the fifth plea of said defendants, by leave of court further says that he ought not to be barred from having his aforesaid action by reason of anything in that plea contained, because he says that there is no record of said alleged proceedings remaining in said District Court of the United States for

the Northern District of Illinois, in manner and form as in said plea set forth, and this the plaintiff prays may be inquired of by the country, etc.

And the plaintiff, as to the additional plea of the defendants filed herein and described as the fifth plea of said defendants, by leave of court further says that he ought not to be barred from having his aforesaid action by reason of anything in that plea contained, because he says that the specifications of objections to the confirmation of said composition mentioned in said plea were in the conduct of said proceedings referred to Honorable Frank L. Wean, Referee in Bankruptcy of said court, as special master for hearing, and that said special master made his report thereupon in which among other things he found and held with reference to said specification mentioned in said plea as follows, to-wit:

"As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of Section 14*b* (3) would require 'the materially false statement in writing' to be made directly to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a commercial agency, to be insufficient, and I am of the opinion that the specification should be overruled for this reason."

Plaintiff further avers that thereafter in the conduct of said proceedings said report of said Referee was duly approved by said court, and that said matters and things in said declaration alleged were not by said report and by the decree in said plea mentioned litigated in and adjudicated by said District Court of the United
23 States for the Northern District of Illinois in said proceedings mentioned in said plea, in manner and form as therein set forth, and this the plaintiff prays may be inquired of by the country, etc.

TENNEY, COFFEEN, HARDING & WILKERSON,
Attorneys for said Plaintiff.

(Endorsed:) Filed May 20, 1907, H. S. Stoddard, Clerk.

Similiter to Replications. Filed March 23, 1908.

And afterwards to-wit: on the twenty-third day of March, 1908, come the defendants in said entitled cause by their attorneys and filed in the clerk's office of said court their certain similiter to replications in words and figures following to-wit:

Similiter to Replications.

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

And the defendants, as to all of the replications of the plaintiff wherein he puts himself upon the country, do the like.

NEWMAN, NORTHRUP, LEVINSON & BECKER,
Attorneys for Defendants.

(Endorsed:) Filed March 23, 1908, H. S. Stoddard, Clerk.

And afterwards to-wit: on the fourteenth day of May, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

24 *Order of May* 14, 1908, *Overruling Motion to Find Issues on Question of Former Adjudication for Plaintiff.*

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Now again come the parties by their attorneys and thereupon the plaintiff renews its motion to have the court find the issues on the question of former adjudication in favor of the plaintiff, which the Court overrules.

Finding of Facts. Filed May 14, 1908.

And on the same day to-wit: the fourteenth day of May, 1908, there was filed in the clerk's office of said court in said entitled cause certain finding of facts n words and figures following to-wit:

Finding of Facts.

In the United States Circuit Court, Northern District of Illinois, Eastern Division.

No. 27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

This cause having come on to be heard by the court upon the issue of former adjudication raised by the pleadings herein, and the court having heard and considered all the evidence introduced, both on behalf of the plaintiff and on behalf of the defendants, now makes the following—

Finding of Facts.

1. That on the first day of February, A. D. 1904, an order was duly entered of record in certain proceedings in bankruptcy then pending in the District Court of the United States for the
25 Northern District of Illinois against the defendants, Henry Friend, Solomon C. Moss and Henry Morris, adjudicating them bankrupt within the intent and meaning of the act of Congress relating to bankruptcy, of which proceedings plaintiff then and there had notice.

2. That thereafter the said plaintiff entered his appearance in said bankruptcy proceedings and filed therein his claim in the sum of $3,204.91 on account of the goods supposed to have been sold and delivered by him to these defendants as in the declaration herein mentioned.

3. That said claim was allowed by said District Court for the sum of $3,204.91.

4. That thereafter in said bankruptcy proceedings these defendants offered terms of composition to their creditors, which terms were accepted in writing by a majority in number of all creditors whose claims had been allowed, which number represented a majority in amount of such claims.

5. That on the 12th day of March, 1904, these defendants filed in said District Court their petition as required by law for the confirmation of said composition.

6. That the plaintiff, on the 24th day of March, 1904, entered his appearance in opposition to the confirmation of said composition, and thereafter on the 2nd day of April, 1904, filed certain specifications of objections to the confirmation of said composition, and in said specifications or objections alleged among other things as follows:

"That said bankrupts obtained from said James Talcott and from other creditors property upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining

such property upon credit; that said statement was so made on or about the 21st day of January, 1903, to Woods Dry Goods Commercial Agency, which, as said bankrupts knew, was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to be communicated to those from whom they sought such credit; that said statement was duly communicated to said James Talcott and to others by said commercial agency for the purpose of being acted upon by them in selling goods to said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon
26 said statement; that by the statement so made in writing by said bankrupts it was averred that they had a net surplus on January 1st, 1903, of ninety-two thousand nine hundred and eighty-eight and 95/100 dollars over and above all debts and liabilities, whereas, in truth and in fact, they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time said statement was made, but were not known to said James Talcott and other creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition in bankruptcy herein."

7. That thereafter said specifications of objections were in the conduct of said bankruptcy proceedings referred to Honorable Frank L. Wean, referee in bankruptcy of said court as special master for hearing.

8. That said special master thereafter made his report thereupon in which among other things he found and held with reference to said specifications as follows, to-wit:

"As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of Section 14*b* (3) would require 'the materially false statement in writing' to be made directly to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a commercial agency, to be insufficient, and I am of the opinion that the specification should be overruled for this reason."

Wherefore no evidence in support of said objection was offered by said Talcott.

9. That thereafter in the conduct of said bankruptcy proceedings said report of said referee was duly approved by the said District Court.

10. That thereafter and on the 7th day of May, 1904, the said petition for confirmation of composition and the said specifications of objections coming on to be heard before the said District Court, the said District Court entered of record a final decree confirming said composition in the words and figures following:

"This matter coming on to be heard on the exception to the report of Referee F. L. Wean on the objections to the confirmation of the composition agreement entered into herein, come the parties by their solicitors, and after arguments of counsel the court
27 being fully advised in the premises overrules said exceptions and approves said report. And it appearing that the compo-

sition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered, in such place as was designated by the Judge of said Court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the acts of Congress relating to bankruptcy; it is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

"It is hereby further ordered and decreed that the distribution of the deposit shall be made by the clerk of the Court as follows, to-wit:

1st. To pay the several claims which have priority;

2nd. To pay the costs of proceedings;

3rd. To pay, according to the terms of the composition the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

To which orders of the Court the Pontoosuc Woolen Manufacturing Co. and James Talcott, jointly, by their solicitors, duly except, and enter their motion for an appeal from said order to the United States Circuit Court of Appeals for the Seventh Circuit; whereupon the court fixes the amount of the appeal bond at the sum of fifty thousand dollars ($50,000)."

11. That said decree so entered on the 7th day of May, 1904, is still in full force and effect.

12. "That prior to said hearing on said 7th day of May, 1904, the plaintiff filed in said District Court the following exception to the referee's report, recommending said composition.

"The court should refuse to confirm the composition, because it erred in sustaining the report of the referee filed on April 26, 1904, and holding that a false statement in writing made to James Talcott through Woods' Dry Goods Commercial Agency, as set forth in said report, was not a ground for opposing the confirmation of the
28 composition, and could not be received in evidence for that purpose, and that said Talcott was not entitled to offer evidence under that objection."

Conclusions of Law. Filed May 14, 1908.

Conclusions of Law.

Upon the foregoing state of facts the court finds that the matters and things involved in this suit were fully adjudicated in said bankruptcy proceedings and that the plaintiff is not entitled to recover in this case. Let a judgment be entered for defendants and against plaintiff for costs of the suit.

KENESAW M. LANDIS, *Judge.*

To the entry of which judgment the plaintiff by his attorneys then and there duly excepts. Exception allowed.

(Endorsed:) Filed May 14, 1908, H. S. Stoddard, Clerk.

Order of May 22, 1908.

And afterwards to-wit: on the twenty-second day of May, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. K. M. Landis, District Judge, appears the following entry to-wit:

Order of May 22, 1908.

Leave given to file amendment to fifth plea instanter.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Now come the parties by their attorneys and on motion of the defendant leave is hereby given to file an amendment to the fifth plea instanter.

And on the same day to-wit: the twenty-second day of May, 1908, come the defendants in said entitled cause by their attorneys and filed in the clerk's office of said court a certain amendment to fifth plea in words and figures following to-wit.

29 *Amendment to Plea, Filed May 22, 1908.*

Amendment to Plea.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

And the defendants by leave of court first had and obtained amend their fifth plea by inserting therein immediately before the words "Wherefore the defendants aver" in the concluding part thereof the following:

That prior to said hearing on said 7th day of May, 1904, the plaintiff filed in said District Court the following exception to the

referee's report recommending said composition viz: The Court should refuse to confirm the composition because it erred in sustaining the report of the referee filed on April 26, 1904, and holding that a false statement in writing made to James Talcott through Woods' Dry Goods Commercial Agency as set forth in the 8th Objection of said Talcott, and as set forth in said report, was not a ground for opposing the confirmation of the composition and could not be received in evidence for that purpose, and that said Talcott was not entitled to offer evidence under that objection.

NEWMAN, NORTHRUP, LEVINSON & BECKER.

(Endorsed:) Filed May 22nd, 1908, H. S. Stoddard, Clerk.

30 *Judgment of May 22, 1908.*

And on the same day to-wit: the twenty-second day of May, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Judgment of May 22, 1908.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Now come the parties by their attorneys, and the court having considered and being now fully advised in the premises finds that the matters and things involved in this suit were fully adjudicated in said bankruptcy proceedings, and that the plaintiff is not entitled to a recovery in this case, and that judgment should be entered in favor of the defendants and against the plaintiff for the costs of suit, to which ruling the plaintiff then and there duly excepts and enters his motion for a new trial which is over-ruled by the court, to which the plaintiff also excepts and enters his further motion in arrest of judgment which is also overruled by the court, the plaintiff again excepting.

It is thereupon considered and adjudged by the court that the defendants have and recover of the plaintiff their costs herein to be taxed and that execution issue therefor.

And thereupon the plaintiff enters his motion for a writ of error to the United States Circuit Court of Appeals for this circuit, and fifteen days are allowed in which to prepare and present his bill of exceptions, and the bond on writ of error is fixed at the sum of two hundred dollars.

And on to-wit: the fifth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain bill of exceptions in the words and figures following to-wit:

31 *Bill of Exceptions, Filed June 5, 1908.*

Bill of Exceptions.

In the United States Circuit Court, Northern District of Illinois, Eastern Division.

No. 27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Bill of Exceptions.

Be It Remembered, That heretofore, to-wit: on the 22nd day of April, 1908, at a stated term of said court begun and holden in Chicago, in the District aforesaid, before his Honor Kenesaw M. Landis, one of the judges of said court, the issues joined in the above stated cause between the said parties on the question of former adjudication, came on to be tried before the said judge without the intervention of a jury, plaintiff being represented by Mr. Roger Sherman of Tenney, Coffeen, Harding & Sherman, and the defendants by Mr. Salomon O. Levinson of Newman, Northup, Levinson & Becker; and on the trial of that issue the attorneys for said defendants to maintain and prove the said issue on their part offered in evidence the following records of the District Court of the United States in and for the Northern District of Illinois, Eastern Division.

Order of Adjudication, Entered Feb. 1, 1904.

Order of February 1, 1904, adjudicating Henry Friend, Solomon C. Moss and Henry Morris bankrupts; which said order is in words and figures as follows:

10050. In Bankruptcy.

In the Matter of HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS, Individually and as Partners under the Firm Name of Friend, Moss and Morris, Bankrupts.

At Chicago, in said district, on the first day of February A. D. 1904. before the Honorable Christian C. Kohlsaat, Judge of said Court in Bankruptcy, the petition of C. F. Engstrom and Company,
32 et al. that the said Henry Friend, Solomon C. Moss and Henry Morris, individually and as partners under the firm name of Friend, Moss & Morris, be adjudged Bankrupts within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Henry

Friend, Solomon C. Moss and Henry Morris, individually and as partners under the firm name of Friend, Moss and Morris, are hereby declared and adjudged Bankrupts, accordingly.

Petition for Confirmation of Composition.

The petition of the bankrupts for confirmation of the composition, which said petition is in words and figures as follows:

In the District Court of the United States, in and for the Northern District of Illinois, Northern Division.

No. 10050. In Bankruptcy.

In the Matter of HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS, Co-partners as Friend, Moss & Morris, Bankrupts.

To the Honorable Christian C. Kohlsaat, Judge of said District Court.

At Chicago, in said District, on the 12th day of March, A. D. 1904, comes Henry Friend, Solomon C. Moss and Henry Morris, of Chicago, Illinois in said District, co-partners as Friend, Moss & Morris, the above named bankrupts, and respectfully represent to the Court that after they had been examined in open court, and had filed in court a schedule of all of their property, and a list of their creditors, as required by law, they offered terms of composition to their creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that said terms of composition provide that said bankrupts shall pay 35% of the amount for which such creditor's claim is allowed,
33 reckoned upon the full amount due such creditor less a discount of 7% and is payable as follows: 10% in cash. 12½% in four months after the confirmation of such composition; and 12½% in six months after the confirmation of such composition.

Said two last mentioned payments to be evidenced by notes to be endorsed or secured as set forth in said composition agreement; that the consideration to be paid by the bankrupts to their creditors the money necessary to pay all debts which have priority, and the costs of this proceeding, amounting in cash in all to the sum of thirty thousand ($30,000) dollars, have been deposited, subject to the order of the Judge in the American Trust & Savings Bank of Chicago; a designated depository of money in bankruptcy cases; that there has also been deposited with said The American Trust & Savings Bank, the notes to be given as provided for in said composition agreement subject to the order of the Judge of this Court.

Wherefore, the said Henry Friend, Solomon C. Moss and Henry Morris (co-partners as Friend, Moss & Morris) ask that said composition may be confirmed by this Court.

HENRY FRIEND.
SOLOMON C. MOSS.
HENRY MORRIS.

POOR COPY

(Endorsed:) 10050. United States District Court. In re Friend Moss and Morris, Bankrupts Petition for Composition. Filed Mar. 12, 1904, at 10:30 o'clock A. M. T. S. MacMillan, Clerk.

Order of March 12, 1904.

Order of March 12, 1904, referring petition for confirmation to Master; which said order is in words and figures as follows:

10050.

In re FRIEND, MOSS & MORRIS, Bankrupts.

Whereas, on this 12th day of March, A. D. 1904, said bankrupts filed their petition herein praying that their composition with creditors be confirmed. It is thereupon

Ordered in accordance with the provisions of Rule Four of the Rules in Bankruptcy of this Court, that said petition be and the same is hereby referred to referee, Frank L. Wean with directions to give notice to the bankrupts' creditors as required by the
34 rules said notice to be returnable before the court on March 24, A. D. 1904, at ten o'clock A. M., that said referee be and he is hereby authorized and directed to hear said application and any objections which may be filed thereto, take proofs thereon, and report his conclusions and recommendations thereon to this court.

Appearance of James Talcott.

Appearance of James Talcott and motion for time to file specifications of objections, which said appearance and motion are in words and figures as follows:

In the District Court of the United States for the Northern District of Illinois.

In the Matter of FRIEND, MOSS & MORRIS, Bankrupts.

And now comes James Talcott, who is a creditor of said bankrupts, and enters his appearance herein for the purpose of objecting to the confirmation of the composition referred to in their petition herein, and asks that ten days time be allowed him to file his specifications of objections.

TENNEY, COFFEEN & HARDING,
Attorneys for James Talcott.

(Endorsed:) 10050. United States District Court. In the matter of Friend, Moss & Morris, Bankrupts. Appearance of James Talcott and Motion for time to file specifications of objection. Filed Mar. 24, 1904, at 10 o'clock A. M. T. C. MacMillan, Clerk. Tenney, Coffeen & Harding, Chicago.

Specifications of objections of James Talcott to petition for confirmation of composition, which specifications are in words and figures as follows:

35 *Specifications of Objections to Petition for Confirmation of Composition.*

In the District Court of the United States for the Northern District of Illinois.

No. 10,050.

In the Matter of FRIEND, MOSS, and MORRIS, Bankrupts.

James Talcott, who is a creditor of said bankrupts, and has filed his claim herein, presents the following specifications of his objections to the confirmation of the composition offered by said bankrupts and referred to in their petition filed herein on March 12th, 1904.

That said bankrupts obtained from said James Talcott and from other creditors property upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining such property upon credit; that said statement was so made on or about the 21st day of January, 1903, to Woods Dry Goods Commercial Agency, which, as said bankrupts knew, was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to be communicated to those from whom they sought such credit that said statement was duly communicated to said James Talcott and to others by said Commercial Agency for the purpose of being acted upon by them in selling goods to said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon said statement; that by the statement so made in writing by said bankrupt it was averred that they had a net surplus on January 1st, 1903, of ninety-two thousand nine hundred eighty-eight and 95/100 dollars over and above all debts and liabilities, whereas, in truth and in fact, they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time said statement was made, but were not known to said James Talcott and other creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition in bankruptcy herein.

36 Wherefore, and for other grounds of objection appearing upon the face of said petition and of the papers presented in connection therewith, and upon the face of the record of these proceedings said James Talcott objects to said composition and prays that the same be not confirmed by this court.

TENNEY, COFFERN & HARDING,
Attorneys for James Talcott.

(Endorsed:) No. 10050 United States District Court. In the matter of Friend, Moss & Morris, Bankrupts. Specifications of Objection to composition. Filed Apr. 2, 1904, 9:45 o'clock A. M. T. S. MacMillan, Clerk.

Exceptions to Report of Master.

Exceptions of James Talcott to report of the special Master which said exceptions are in words and figures as follows:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the District Court of the United States for said Northern District of Illinois, Northern Division.

No. 10050.

In the Matter of FRIEND, MOSS, and MORRIS, Bankrupts.

And now comes James Talcott by Tenney, Coffeen & Harding, his attorneys, and by leave of court first obtained excepts to the report on the objections to the conformation of the composition, offered by bankrupts, of Frank L. Wean, referee, as special master, for the following reason, to-wit:

The court should refuse to confirm the composition, because it erred in sustaining the report of the referee filed on April 26, 1904, and holding that a false statement in writing made to James Talcott through Woods' Dry Goods Commercial Agency, as set forth in the eighth objection of said Talcott, and as set forth in said report was not a ground for opposing the confirmation of the composi-
37 tion, and could not be received in evidence for that purpose, and that said Talcott was not entitled to offer evidence under that objection.

Wherefore he prays that the objections to the composition be sustained and that the court refuse to confirm the composition.

TENNEY, COFFEEN & HARDING,
Attorneys for James Talcott.

(Endorsed:) No. 10050. United States District Court, In the matter of Friend, Moss & Morris, Bankrupts. Exceptions of James Talcott to Referee's Report on Objections to composition. Filed May 4, 1904, at 4.25 o'clock P. M. T. C. MacMillan, Clerk.

Order of May 7, 1904.

Order of May 7, 1904, overruling exceptions to Master's report and confirming the composition, which said order is in words and figures as follows:

In the District Court of the United States for the said Northern District of Illinois, Saturday, May 7, A. D. 1904.

Present, the Hon. Christian C. Kohlsaat, Judge.

10050.

In re FRIEND, MOSS & MORRIS, Bankrupts.

This matter coming on to be heard on the exceptions to the report of Referee F. L. Wean on the objections to the confirmation of the composition agreement entered into herein, come the parties by their solicitors, and after arguments of counsel the court being fully advised in the premises overrules said exceptions and approves said report. And it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration of the money required by law to be deposited having been deposited as ordered, in such place as was designated by the Judge of said Court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of
38 any of the acts or failed to perform any of the duties which would be a bar to a discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the acts of Congress relating to bankruptcy; it is therefore hereby ordered that the said composition be, and it is hereby confirmed.

It is hereby further ordered and decreed that the distribution of the deposit shall be made by the clerk of the Court as follows, to-wit:

1st. To pay the several claims which have priority;

2nd. To pay the costs of proceedings;

3rd. To pay, according to the terms of the composition the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

To which orders of the Court the Pontoosuc Woolen Manufacturing Co. and James Talcott, jointly, by their solicitors, duly except, and enter their motion for an appeal from said orders to the United States Circuit Court of Appeals for the Seventh Circuit; whereupon the court fixes the amount of the appeal bond at the sum of fifty thousand dollars ($50,000).

Report of Special Master.

Whereupon the attorneys for said plaintiff to maintain and prove the said issue on his part, offered in evidence the following records of the said United States District Court.

Report of Special Master of April 26, 1904, which said report is in words and figures as follows:

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy. No. 10050.

In the Matter of FRIEND, MOSS & MORRIS, Bankrupts.

Report of Special Master on Objections to the Confirmation of Composition.

To the Honorable Christian C. Kohlsaat, Judge of said Court:

I, Frank L. Wean, Referee in Bankruptcy to whom as Special Master was heretofore referred, the matter of the specifications of objections to the confirmation of the composition in said
39 cause filed herein on April 2nd, 1904, on behalf of James Talcott and Pontoosuc Woolen Manufacturing Company, and the American Woolen Company of New York, a corporation, creditors of said bankrupts, do hereby report:

That the said matter was duly set for hearing before me for argument on the sufficiency of said specifications and that on such argument it was contended that specification numbered 1, to the effect that the bankrupts had not nor had any or either of them filed any schedule of their individual property, was insufficient to warrant the court in refusing to confirm the said composition.

It is also contended that specification numbered 8, filed on behalf of James Talcott, was not sufficient, if true, to prevent the confirmation of the composition because the statement charged was alleged to have been made to a Commercial Agency and not such false statement in writing made to the objecting creditor directly for the purpose of obtaining such property on credit.

As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of Section 14*b* (3) would require the "Materially false statement in writing" to be made directly to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a Commercial Agency to be insufficient, and I am of the opinion that the specification should be overruled for this reason.

I am also of the opinion that specification No. 4, filed by the Pontoosuc Woolen Manufacturing Company is insufficient and should be overruled.

I am further of the opinion that the other specifications, if proven to be true, would be sufficient to prevent the confirmation of the composition and that if the court should determine that if specification 1 is insufficient, that evidence should be heard with reference to the other specifications.

Chicago, April 26, 1904.

FRANK L. WEAN,
Special Master.

40 *Order of April 26, 1904.*

Order of April 26, 1904, approving Special Master's Report, which said order is in words and figures as follows:

No. 10050.

In re FRIEND, MOSS & MORRIS, Bankrupts.

On motion of said bankrupts by their solicitors, after hearing arguments of counsel, the court being fully advised in the premises, it is—

Ordered that that portion of the order of adjudication heretofore entered herein adjudicating the members of said bankrupt partnership individually bankrupt be and the same is hereby vacated and set aside, and this matter coming on further to be heard on the report of referee Frank L. Wean on the objection of James Talcott et al. to the confirmation of the composition herein, come the parties by their solicitors, and after hearing arguments of counsel the court being fully advised in the premises, it is—

Ordered that said report be and the same is hereby approved except to that portion thereof relating to the filing of individual schedules by the members of said partnership.

The foregoing was all the evidence produced on the trial of said cause.

And thereupon, the plaintiff, by his attorneys, moved the court to find the issues on the question of former adjudication for the plaintiff, on the ground that the evidence in support of the plaintiff's special replication which set out the finding of the Master in reference to specifications No. 8 of James Talcott is adequate, unambiguous and uncontradicted, and that there is a total lack of evidence in support of the defendant's rejoinder thereto, but the court denied the said motion, to which decision of the court in denying such motion plaintiff by his counsel then and there duly excepted.

And the above entitled cause coming on further to be heard upon the trial of said issue on the 22nd day of May, 1908, the parties being represented as before, the court made and entered a certain finding of facts, and thereupon also found and entered as conclusions of law the following:

"Upon the foregoing state of facts the court finds that the matters and things involved in this suit were fully adjudicated in said bankruptcy proceeding, and that plaintiff is not entitled to recover in this case."

41 To the finding and entering of which conclusions of law, and each of them, the plaintiff, by his attorneys, then and there duly excepted, and thereupon the court gave judgment for the defendants and against the plaintiff for costs of this suit, to which said judgment and the entry thereof the plaintiff, by his counsel, then and there duly excepted.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiff tenders this his bill of exceptions and prays that the same may be signed and sealed by the Judge of this court before whom said cause was tried pursuant to law, which is done accordingly this fifth day of June, A. D. 1908.

KENESAW M. LANDIS, [SEAL.]
Judge.

By Agt.
K. M. L.

(Endorsed:) Filed June 5, 1908, H. S. Stoddard, Clerk.

Petition for Writ of Error, Filed June 19, 1908.

And afterwards to-wit: on the nineteenth day of June, 1908, come the plaintiff in said entitled cause by his attorney and filed in the clerk's office of said court his certain petition for a writ of error in words and figures following to-wit:

Petition for a Writ of Error.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States Circuit Court for the Northern District of Illinois, Eastern Division.

No. 27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

To the Honorable the Judges of the United States Circuit Court for the Northern District of Illinois.

Your petitioner, James Talcott, complains and shows that in the record and proceedings had in said cause, and also in the ren-
42 dition of the judgment therein against your petitioner on the 22nd day of May, A. D. 1908, manifest error hath happened to the great damage of your petitioner.

Your petitioner tenders herewith his assignment of errors, to the end that said errors shall be duly corrected and full and speedy justice done to your petitioner.

Your petitioner therefore prays that a writ of error to said Circuit Court be awarded, commanding the judges of said court to send the records and proceedings of said cause under the seal of said Circuit Court to the United States Circuit Court of Appeals for the Seventh Circuit with all convenient speed and that such proceedings may be

taken as will correct the errors of said Circuit Court according to the law and custom of the United States.

And your petitioner will ever pray, etc.

JAMES TALCOTT,
By TENNEY, COFFEEN, HARDING & SHERMAN, *His Attorneys.*

TENNEY, COFFEEN, HARDING & SHERMAN,
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

Roger Sherman, being first duly sworn, deposes and says that he is one of the attorneys for petitioner in the above entitled cause and his duly authorized agent in this behalf, and that the statements contained in said petition are true.

ROGER SHERMAN.

Subscribed and sworn to before me this 18 day of June, A. D. 1908.

BERNICE C. CAUGHEY,
[SEAL.] *Notary Public, Cook County, Illinois.*

(Endorsed:) Filed June 19, 1908, H. S. Stoddard, Clerk.

43 *Assignment of Errors. Filed June 19, 1908.*

And on the same day to-wit: the nineteenth day of June, 1908, come- the plaintiff in said entitled cause by his attorney and filed in the clerk's office of said court his certain assignment of errors in words and figures following to-wit:

Assignment of Errors.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States Circuit Court, Northern District of Illinois, Eastern Division.

No. 27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

And now comes James Talcott, the plaintiff in the above entitled cause, and suggests to the court here that there is manifest error in the records and proceedings aforesaid, and that said Circuit Court erred:

1. In that it refused, at the conclusion of the evidence, to find the issue on the question of former adjudication for the plaintiff.
2. In that it overruled plaintiff's motion to find the issue on the question of former adjudication for plaintiff;
3. In that it found that the matters and things involved in said suit were adjudicated in the bankruptcy proceedings.
4. In that it found that the plaintiff was not entitled to recover in this case.
5. In that it entered judgment for defendants.
6. In that it entered judgment for defendants when the facts found by it did not justify such judgment.
7. In that the judgment entered in said cause is not supported by the finding of facts.

TENNEY, COFFEEN, HARDING & SHERMAN,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed June 19, 1908, H. S. Stoddard, Clerk.

44 *Order of June 19, 1908.*

And on the same day to-wit: the nineteenth day of June, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Order of June 19, 1908, Allowing Writ of Error.

27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

Now on this day comes the plaintiff by his attorney and presents his motion and petition for writ of error to the United States Circuit Court of Appeals for this circuit, together with the assignments of error; and thereupon it appearing to the court that the bond on writ of error in the penalty of two hundred ($200) dollars has heretofore been approved and filed, it is ordered that said writ of error be, and the same is hereby allowed to the United States Circuit Court of Appeals for the Seventh Circuit to have reviewed the judgment heretofore entered herein on May twenty-second, 1908, and that a writ of error issue forthwith and that a copy be deposited for the defendants in error; and that a citation issue forthwith returnable within thirty days.

Bond Filed June 19, 1908.

And on the same day to-wit: the nineteenth day of June, 1908, come James Talcott as principal and American Bonding Company of Baltimore, as surety and filed in the clerk's office of said Court a certain bond on writ of error in words and figures following to-wit:

Bond on Writ of Error.

Know All Men by These Presents, That we, James Talcott, as principal and American Bonding Company, of Baltimore, as sureties are held and firmly bound unto Henry Friend, Solomon C. Moss and Henry Morris, in the full and just sum of two hundred
45 dollars ($200.00) to be paid to the said Henry Friend, Solomon C. Moss and Henry Morris, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 19th day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois—Eastern Division, in a suit depending in said Court, between James Talcott and Henry C. Friend, Solomon C. Moss and Henry Morris, a judgment was rendered against the said James Talcott, and the said James Talcott having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Friend, Solomon C. Moss and Henry Morris, citing and admonishing them to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within 30 days from the date hereof.

Now, the condition of the above obligation is such, that if the said James Talcott shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JAMES TALCOTT, [SEAL.]
By TENNEY, COFFEEN, HARDING & SHERMAN, *His Attorneys.*
AMERICAN BONDING COMPANY OF BALTIMORE, [SEAL.]
By W. HERBERT STEWART, [SEAL.]
Vice-President.

Attest:
GEORGE S. HASKELL,
Ass't Secretary.

Approved by
K. M. L.

(Endorsed:) Filed June 19, 1908, H. S. Stoddard, Clerk.

46 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between James Talcott, Plaintiff and Henry Friend, Solomon C. Moss and Henry Morris, Defendants, a manifest error hath happened, to the great damage of the said James Talcott, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the nineteenth day of June, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] H. S. STODDARD,
Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.

Allowed by
KENESAW M. LANDIS, *Judge.*

47 *Return to Writ of Error.*

NORTHERN DISTRICT OF ILLINOS, *ss:*

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 16th day of July A. D. 1908.

[SEAL.] H. S. STODDARD,
Clerk United States Circuit Court, Northern District of Illinois.

(Endorsed:) Writ of Error. Filed June 19, 1908, H. S. Stoddard, Clerk.

Præcipe for Transcript, Filed June 27, 1908.

Circuit Court of the United States, Northern District of Illinois, Eastern Division.

No. 27716.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

To the Clerk of the Circuit Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and include in said transcript the following pleadings, proceedings, and papers on file, to-wit:

Præcipe for Summons.
Summons and Marshal's return thereon endorsed.
Declaration.
Pleas.
Order Mar. 27, 1906, giving leave to file additional counts.
" " 30, 1906, that pleas to original declaration stand as pleas to additional counts.
Replication and demurrer to pleas.
Order of Jan. 27, 1907, sustaining demurrer to second and fourth pleas and giving leave to file addition- pleas.
Additional plea filed Feb. 2, 1907.
48 Demurrer to additional plea.
Order of Feb. 26, 1907, overruling demurrer to additional plea and giving plaintiff leave to reply double.
Replication to Additional plea.
Similiter to Replication.
Order of May 14, 1908, overruling motion to find issues on question of former adjudication for plaintiff.
Findings of Fact.
Order May 22, 1908, giving leave to file amendment to plea.
Amendment to plea.
Judgment against plaintiff.
Order May 22, 1908, fixing bond on writ of error $200, and giving 15 days to file Bill of Exceptions.
Order June 5, 1908, approving Bill of Exceptions.
Bill of Exceptions.
Assignment of errors.
Petition for writ of error.
Order granting writ of error.
Bond on writ of error.
Writ of error.
Clerk's certificate.
Citation.

TENNEY, COFFEEN, HARDING & SHERMAN,
Attorneys for James Talcott.

(Endorsed:) Filed June 27, 1908, H. S. Stoddard, Clerk.

Clerk's Certificate.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court made in accordance with Præcipe filed in the cause entitled James Talcott vs. Henry Friend, Solomon C. Moss and Henry Morris, as the same appear from the original records and files of said Court now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Chicago, in said District, this Sixteenth day of July, 1908.

[SEAL.] H. S. STODDARD, *Clerk.*

49 *Citation, Filed June* 22, 1908.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Henry Friend, Solomon G. Moss and Henry Morris, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, wherein James Talcott, is the plaintiff in error, and you are defendants in error to show cause, if any there be, why the Judgment rendered against the said Plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kenesaw M. Landis, Judge of the District Court of the United States, this nineteenth day of June, in the year of our Lord one thousand nine hundred and eight.

KENESAW M. LANDIS,
District Judge.

Service accepted of foregoing citation this 22nd day of June 1908.

NEWMAN, NORTHRUP, LEVINSON & BECKER,
Attorneys for Henry Friend, Solomon C. Moss & Henry Morris.

(Endorsed:) Citation. Circuit Court of the United States Northern District of Illinois, Eastern Division, Filed Jun- 22, 1908. H. S. Stoddard, Clerk.

50 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 49, inclusive, contain a true copy of the printed record, printed under my supervision, and filed August 10, 1908, on which this cause was argued, heard and determined in the case of James Talcott vs. Henry Friend, Solomon C. Moss and Henry Morris No. 1511, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of September A. D. 1910.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

51 At a Regular Term of the United States Circuit Court of Appeals Begun and Held at the United States Court Rooms in the City of Chicago in said Seventh Circuit on the First Day of October, A. D. Nineteen Hundred and Seven, of the October Term in the Year of Our Lord One Thousand Nine Hundred and Seven, and of Our Independence the One Hundred and Thirty-second.

And afterwards, to-wit: On the twenty-fifth day of July, 1908, in the October Term last aforesaid, came the plaintiff in error, by his counsel Mr. Horace Kent Tenney, Mr. M. Lester Coffeen, Mr. Charles F. Harding, and Mr. Roger Sherman, and filed in the office of the clerk of this Court, their appearance, which appearance is in the words and figures following, to-wit:—

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1907.

No. 1511.

JAMES TALCOTT, Plaintiff in Error,
vs.
HENRY FRIEND et al., Defendant- in Error.

The clerk will enter my appearance as counsel for the plaintiff in error.

HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHAS. F. HARDING, AND
ROGER SHERMAN.

Endorsed: Filed July 25, 1908, Edward M. Holloway, Clerk.

And afterwards, to-wit: On the tenth day of August, 1908, in the October Term last aforesaid, came the defendant in error by his counsel, Mr. Jacob Newman, Mr. S. O. Levinson, Mr. Benjamin V. Becker, Mr. Chester E. Cleveland, Mr. Harry Goodman and Mr. Arthur B. Schaffner, and filed in the office of the clerk of
52 this Court their appearance, which appearance is in the words and figures following, to-wit:—

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1907.

No. 1511.

JAMES TALCOTT, Plaintiff in Error,
vs.
HENRY FRIEND et al., Defendant- in Error.

The clerk will enter my appearance as counsel for defendant in error.

JACOB NEWMAN.
S. O. LEVINSON.
BENJAMIN V. BECKER.
CHESTER E. CLEVELAND.
HARRY GOODMAN.
ARTHUR B. SCHAFFNER.

Endorsed: Filed Aug. 10, 1908. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Sixth Day of October, One Thousand Nine Hundred and Eight, of the October Term in the Year of Our Lord One Thousand Nine Hundred and Eight, and of Our Independence the One Tundred and Thirty-third Year.

And afterwards, to-wit: On the fifth day of January, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

53 TUESDAY, *January* 5, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before:

Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.

1511.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on January 26, 1909.

And afterwards, to-wit: On the twenty-sixth day of January, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

TUESDAY, *January 26*, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

54 1511.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Roger Sherman, counsel for plaintiff in error, and by Mr. S. O. Levinson, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Fifth Day of October, One Thousand Nine Hundred and Nine, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Nine, and of Our Independence the One Hundred and Thirty-fourth Year.

And afterwards, to-wit: On the fourth day of December, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court the Opinion of the Court in the words and figures following, to-wit:—

55 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term & Session, A. D. 1909.

No. 1511.

JAMES TALCOTT, Plaintiff in Error,

v.

HENRY FRIEND, SOLOMON C. MOSS and HENRY MORRIS, Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker, and Seaman, Circuit Judges.

The case is stated in the opinion.

BAKER, *Circuit Judge*, delivered the opinion of the court:

Plaintiff in error, who was plaintiff below, brings this writ of error to reverse a judgment that he take nothing by his action on the case against defendants for their alleged deceit in obtaining goods from him by means of false written representations concerning their financial responsibility. Among various pleas, defendants filed one setting forth certain records in bankruptcy proceedings in the District Court for the Northern District of Illinois and alleging that by reason thereof plaintiff was barred from prosecuting his present action. Plaintiff filed several replications, in one of which he set forth an additional portion of the same bankruptcy proceedings and claimed that by reason thereof he was not within the alleged bar of former adjudication. Defendants filed a similiter. Thereafter plaintiff made a "motion to have the court find the issues on the question of former adjudication in favor of plaintiff." Without objection by defendants the court proceeded with a trial of the aforesaid motion, without the intervention of a jury. And each side, at such trial, introduced in evidence, without objection, the
56 records in bankruptcy set forth in the plea and replication. Thereupon the court, in the form of a finding of facts, recited the contents of those records, stated as a conclusion of law that the matters involved in plaintiff's declaration herein had been fully adjudicated in the bankruptcy proceeding, and entered the judgment which is brought up by this writ of error.

Each side now seeks to take advantage of alleged infirmities in his adversary's pleadings. But we will not stop to judge of the merits of this fencing, because in the light of the record it is impertinent, particularly when we bear in mind that pleadings were primarily intended, not as traps and snares, but as means of fairly advising the adversary in advance of the trial, what the pleader would offer to prove at the trial. The plea fairly advised plaintiff that defendants would offer certain records. So, too, the replication fairly advised defendants that plaintiff would offer certain additional records. Each side deliberately refrained from seeking a ruling upon the legal sufficiency of his adversary's pleadings, but joined with his adversary in asking judgment with regard to the legal effect of a concededly existent and true record, in its entirety, upon plaintiff's right to a trial of his present alleged cause of action. On such a record the parties can not properly inquire of us what rulings the circuit court ought to have made if demurrers or motions for judgment on the pleadings had been duly interposed.

Defendants also contend that nothing can be considered on this writ of error, because a trial by jury was not waived by written stipulation. There was no question of fact to be decided at the aforesaid limited hearing. On what was virtually an agreed statement of facts the parties submitted to the court questions of law.

Briefly, the facts were these: On Feb. 1, 1904, defendants were adjudged bankrupts. Plaintiff filed a claim for $3204 as the agreed price of goods sold and delivered by him to defendants. The claim was allowed, and plaintiff received his share under a composition which was confirmed. Plaintiff opposed the confirmation, and filed a specification in which he alleged that defendants in Jan., 1903, made a statement in writing to Woods Dry Goods Commercial Agency, in which statement defendants showed net assets of $9250.00 over and above all debts and liabilities; that defendants gave the statement to the Agency for the purpose of having the Agency communicate it to plaintiff and other wholesalers in order that
57 plaintiff and others should sell and deliver goods to defendants on credit in reliance upon the truth of said statement; that the Agency communicated said statement to plaintiff and others; that plaintiff and others sold and delivered goods to defendants on credit, and in so doing relied upon the truth of said statement; that the statement was false; that defendants, at the time of making the statement, had no assets in excess of their debts and liabilities, but were utterly insolvent, as they well knew; and that plaintiff and others were ignorant of the falsity of said statement until after the petition in bankruptcy was filed. The district court, construing section 14*b* (3)* to mean that a bankrupt debtor should

*Section 14*b* (3) provides that "The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

not be refused a discharge (confirmation of a composition operating as a discharge*') on account of having made a materially false statement in writing, unless the statement was made by the debtor directly to the creditor whom the debtor intended to deceive, ruled that the specification aforesaid failed to state facts sufficient to constitute a bar to defendants' discharge, and entered judgment as follows: "It appearing that the composition has been accepted by a majority * * * and that the bankrupts have not been guilty of any of the acts, or failed to perform any of the duties, which would be a bar to a discharge, * * * it is therefore ordered that the said composition be, and it hereby is, confirmed." This judgment has remained in full force and effect. The deceit counted on in the declaration in the present action is the defendants' giving of the same false statement in writing which was set forth in plaintiff's objection to the confirmation of the composition. The damages alleged to have been suffered as the consequence of the deceit are the unpaid balance of the price fixed in the contract of purchase.

I. What effect upon plaintiff's right to maintain this action on the case for deceit is exerted by the fact that plaintiff filed against the estate in bankruptcy his claim under the contract of purchase, and shared in the distribution?

Filing the claim was an affirmance of the contract of sale,
58 and constituted an election not to rescind and attempt to recover what plaintiff had delivered to defendants in pursuance of the contract. But an action for deceit is not based on rescission; it, too, implies an affirmance; it means that plaintiff has elected to abide by the contract, to retain and make the best of what he received thereunder, and to recover the difference between what he received and what he parted with, as his damages in being misled.

In Cheney v. Dickinson, 172 Fed. 109, we pointed out that an action for deceit can be maintained against any one who intentionally deceived the plaintiff into making and carrying out the contract. Against any one,—quite irrespective of whether the deceiver was himself a party to the contract or not. "In such an action it is immaterial whether the defendant did or did not receive the consideration or other benefit, because the gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction." So there was no inconsistency in plaintiff's realizing all he could from defendants' explicit promise to pay, and afterwards demanding damages for having been deceived into accepting such a poor obligation in exchange for his goods, because the defendants were sued in two separate and distinct capacities. That the promisors in the contract case and the fraud-doers in the deceit case were the same persons was an incident immaterial to either case.

In Frey v. Torrey, 70 App. Div. (N. Y. 166, 8 A. B. R. 196, affirmed by the Court of Appeals in 175 N. Y. 501, which was an

*Section 14c. "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

action by respondent, plaintiff below, to recover damages suffered through appellant's deceit in inducing respondent to deposit money with appellant while insolvent, the court said: "The appellant's contention that the respondent is estopped from prosecuting this action by his election to prove his claim in bankruptcy remains to be considered. * * * We fail to discover any inconsistency between the remedy pursued by the respondent in the bankruptcy court and that adopted by bringing this action. It does not necessarily appear that the respondent waived the tort by filing proof of his claim in bankruptcy. If not, merely proving the indebtedness which concededly existed and which was induced by fraud would not be inconsistent with subsequently bringing an action to recover the money obtained by fraud"*

59 If a claimant in bankruptcy had in truth no contract on which to base his claim; if he did not in fact sell and deliver, nor intend to sell and deliver, the goods to the bankrupt; if the bankrupt obtained possession of the goods by theft or force or trick; and if the claimant proved the theft or force or trick to support the legal fiction of a contract,—then it might properly be ruled that the injured party should not be permitted thereafter to prove the same theft or force or trick to support an action in tort. That is, a waiver of the tort would be held to be the basis of the fiction that there was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with the contract's existence is necessary to the contract's enforcement.

We conclude, therefore, that the prosecution of the claim in bankruptcy was not a bar to this action for deceit.

II. What effect is to be attributed to that part of the record in bankruptcy which shows that plaintiff interposed as an objection to defendants' discharge the deceit counted on in the present declaration and that the court found "that the bankrupts have not been guilty of any of the acts which would be a bar to a discharge?"

Reading the above quoted part of the decree in the light of the prior proceedings which show that the court held, as a matter of law, that the specification was insufficient, and that no evidence was introduced, the meaning of the finding is "that the bankrupts have not been shown to have been guilty of any of the acts or omissions which would be a bar to a discharge." In the absence of such a showing, it was the duty of the court, under sec. 14*b*, to grant the discharge (confirm the composition).

Objections to discharge may be made by any "party in interest." That term certainly includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. The third ground of objection is available if the bankrupt in the manner therein stated "obtained property on credit from any person." Any creditor may therefore urge this objection, whether he was the defrauded party or not. In re Harr, 143 Fed.

* See also: Stokes v. Mason, 10 R. I. 261; McBean v. Fox, 1 Ill. App. 177; Mallory v. Leach, 35 Vt. 136; Bowen v. Mandeville, 95 N. Y. 237; Hastings v. McGee, 66 Pa. St. 385.

421. The application for a discharge consequently tenders an issue to all parties in interest. If all remain silent, all are bound by the finding which follows the failure to present objections. All equally have the right and the opportunity to object; but if only one does so, he cannot keep the outcome to himself—all share in the
60 result. Thus identity in interest of the parties to the application for discharge and objections thereto and the parties to this action for deceit is wanting. In the bankruptcy court the parties were the defendants in the capacity of insolvent debtors and the plaintiff in the capacity of a representative of all parties interested in opposing the discharge, while in this action the parties are the defendants in the capacity of fraud-doers (separate and distinct from their character of contractors, as hereinbefore pointed out) and the plaintiff in the capacity of the solitary victim of their deceit. So also there is lacking an identity of issues, for in the bankruptcy proceeding the only proper issue was the bankrupts' right to a discharge as against all parties in interest. In re Thomas, 92 Fed. 912; In re Rhutassel, 96 Fed. 597.*

Our conclusion therefore is that plaintiff's act in pleading defendants' deceit in opposition to the application for a discharge, and the aforesaid finding of the court with respect thereto, fail to bar plaintiff from maintaining this action.

III. What effect should be given to that part of the bankruptcy record which confirms the compositon and thereby discharges the defendants?

By section 17 "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations."

The cause of action for deceit, not having been reduced to "a fixed liability as evidenced by a judgment," was not a "provable debt" (section 63 of the act; 1 Remington on Bankruptcy, pp. 376, 424) and therefore was not extinguished by the discharge.

But if the cause of action for deceit were to be considered as a provable debt, it would be saved by the second exception in section 17. This exception is not lessened from the natural import of its language by the provision in section 14*b* (3). The two provisions are of course to be read as parts of the same statute. But they do not limit each other, because on looking to the particular subjects treated by them respectively, they are found to be not in pari materia. Releasing an insolvent debtor from his debts is an act of grace. The fixing by Congress of the considerations on which the discharge will be granted or withheld is a matter separate and apart from determining the effect to be given the discharge in sub-
61 sequent litigation. Katzenstein v. Reid, 41 Tex. Civ. App. 106, 16 A. B. R. 740.

Furthermore, if section 14*b* (3) were to be interpolated into section 17 (2), Congress would be held to have intended the absurdity

* See also: In re Tinker, 99 Fed. 79, and the reference thereto on page 474 in Tinker v. Colwell, 193 U. S. 473.

that deceivers, despite their discharges, should remain liable for oral deceits although excused from written deceits.

In our opinion, therefore, the record of the discharge is no bar.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A true Copy.

Teste:

____ ____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

62 And afterwards, on the same day, to-wit: On the fourth day of December, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record to-wit:

SATURDAY, *December* 4, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier:

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1511.

JAMES TALCOTT
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

63 And afterwards, to-wit: On the third day of January, 1910, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, *January* 3, 1910.

Court met pursuant to adjournment and was opened by proclamation of crier:

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1511.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Upon the filing of stipulation of counsel, it is now ordered that the time for filing a petition for a rehearing in this cause be, and the same is hereby extended ten days from the time allowed by the rules of this Court.

And afterwards, to-wit: On the thirteenth day of January, 1910, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Petition for Rehearing, which Petition for Rehearing is not copied here.

And afterwards, to-wit: On the second day of February, 1910, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

64 WEDNESDAY, *February* 2, 1910.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1511.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Upon the filing of stipulation of counsel, it is ordered that the time for filing an answer to the petition for a rehearing in this cause,

be, and the same is hereby extended to and including February 20, 1910.

And afterwards, to-wit: On the eighteenth day of February, 1910, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *February* 18, 1910.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. William H. Seaman, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

65 Before Hon. William H. Seaman, Circuit Judge.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1511.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

Upon the filing of stipulation of counsel, it is now ordered that the time for filing an answer to the petition for rehearing in this cause be, and is hereby extended to March 1, 1910.

And afterwards, to-wit: On the twenty-eighth day of February, 1910, in the October Term last aforesaid, there was filed in the office of the clerk of this Court the Answer to the Petition for Rehearing, which said Answer is not copied here.

And afterwards, to-wit: On the tenth day of June, 1910, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *June* 10, 1910.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1511.

JAMES TALCOTT
vs.
HENRY FRIEND et al.

It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied.

66–67 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from one to fifteen, inclusive, contain a true copy of the proceedings had and papers filed, except the briefs of counsel, the petition for rehearing with stipulations and motions relating thereto, the answer to the petition for rehearing with stipulations relating thereto, the notice of Motion, Citations, Answer to Citations and the Reply to Answers, in the case of James Talcott vs. Henry Friend, et al., No. 1511, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of September, A. D. 1910.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

68 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which James Talcott is plaintiff in error and Henry Friend, Solomon C. Moss, and Henry Morris are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command
69 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the first day of December, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States

70 *Return to Writ.*

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of James Talcott, Plaintiff in Error, vs. Henry Friend, Solomon C. Moss and Henry Morris, Defendants in Error, No. 1511, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Seventh Circuit, at office in the City of Chicago, Illinois, this twenty-eighth day of December, A. D. 1910.

[Seal United States Circuit Court of Appeals,
Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk U. S. Circuit Court of Appeals
for the Seventh Circuit.

[Endorsed:] File No. 22,369. Supreme Court of the United States, No. 748, October Term, 1910. Henry Friend, Solomon C. Moss, and Henry Morris vs. James Talcott. Writ of Certiorari.

70½ In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1511.

JAMES TALCOTT, Plaintiff in Error,
vs.
HENRY FRIEND, SOLOMON C. MOSS, and HENRY MORRIS, Defendants in Error.

Whereas, a writ of certiorari was issued out of the office of the Clerk of the Supreme Court of the United States, bearing date the 1st day of December, 1910, directed to the Judges of this Court and commanding them to send to the said Supreme Court the record and proceedings in the above entitled cause, so that the said Supreme Court might act thereon as of right and according to law ought to be done; and

Whereas, there has heretofore been filed in the office of the Clerk of said Supreme Court with the application of the said Defendants in Error for said writ of certiorari, a transcript certified by the Clerk of this Court of the record of the Circuit Court of the United States for the Northern District of Illinois upon which the above entitled cause was heard in this court, and a transcript certified by the clerk of this Court of the proceedings in said cause in this Court;

Now, therefore, it is hereby stipulated and agreed that said certified transcripts of record now on file in the office of the Clerk of said Supreme Court may be had and taken as a due return to said writ of certiorari.

Dated Dec. 4, 1910.

HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHAS. F. HARDING,
ROGER SHERMAN,
Counsel for Plaintiff in Error.
JACOB NEWMAN,
S. O. LEVINSON,
BENJAMIN V. BECKER,
C. E. CLEVELAND,
HARRY GOODMAN,
ARTHUR B. SCHAFFNER,
Counsel for Defendants in Error.

71 [Endorsed]: File No. 22,369. Supreme Court U. S. October Term, 1910. Term No. 748. Henry Friend et al., Petitioners, vs. James Talcott. Writ of certiorari and return. Filed December 31, 1910.

FILED.
NOV 29 1912
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 155

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR PETITIONERS.

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER,
Attorneys for Petitioners.

SMITHROP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

STATEMENT:

Plaintiff's declaration 1, 2
Defendant's pleas 2
Plaintiff's replication 3
Findings of the Circuit Court..... 3, 4
Synopsis of opinion of Court of Appeals..... 4-6

THE ISSUE AS TO THE EFFECT UPON A DISCHARGE OF THE SUPPOSED STATEMENT TO WOODS COMMERCIAL AGENCY WAS ADJUDICATED IN THE BANKRUPTCY PROCEEDING:

1. Same issue involved in bankruptcy as in case at bar.13-19, 33-42

2. The adjudication of the Bankruptcy Court on this issue is conclusive 13-23
24 Am. & Eng. Ency. of Law, 714, 780.....24, 25
Jeter *v.* Hewitt, 22 How., 352, 364..... 24
Southern Pacific R. R. Co. *v.* United States, 168 U. S., 1, 48 25
Stone *v.* United States, 64 Fed., 667, 670..... 25

3. The adjudication was upon the merits and was binding, although it was upon an issue of law.....13-15
24 Am. & Eng. Ency. of. Law, 799..... 27
Bissel *v.* Spring Valley Township, 124 U. S., 225, 232.... 26
Gould *v.* Evansville, etc., R. R., 91 U. S., 526, 533..... 27

4. The binding effect of the adjudication cannot be destroyed by the claim that the parties appeared in the bankruptcy proceeding in different capacities from what they appeared in the case at bar.....19-20
24 Am. & Eng. Ency. of Law, 735, 737.....29, 30
Corcoran *v.* C. & O. Canal Co., 94 U. S., 741, 745..... 29
United States *v.* California, etc., Co., 192 U. S., 355, 357.29-30

5. All the business was partnership business and Friend, Moss & Morris were discharged as partners.....16-19
In re Bertenshaw, 157 Fed., 363 (Dissenting opinion of Judge Hook) 17
Dickas *v.* Barnes, 140 Fed., 849..... 17

In re Forbes, 128 Fed., 137 17
Francis v. McNeal, 186 Fed., 481 17
Re Purley & Hays, 138 Fed., 927 17
Tumlin v. Bryan, 165 Fed., 168 17
Vaccaro v. Security Bank, 168 Fed., 430 17

5. Talcott elected to have the Bankruptcy Court pass upon this issue and cannot question the right of that court to do so 31-33, 60-62
11 Am. & Eng. Ency. of Law, 446, 447 33
Hewitt v. Northrup, 75 N. Y., 506, 510 33
Starbuck v. Starbuck, 173 N. Y., 503, 506 33

7. Talcott was a party interested in the bankruptcy proceeding in the discharge of Friend, Moss & Morris 60-63

8. The binding effect of the adjudication would not be affected by the fact (if it be a fact) that the decision of the Bankruptcy Court was erroneous 45-47
Deposit Bank v. Frankfort, 191 U. S., 499, 510 46
Gunter v. Atlantic Coast Line, 200 U. S., 237, 260 46
As to whether the District Court erred:
In re Dresser, 146 Fed. Rep., 385 45
In re Carton, 148 Fed., 63 45
In re Kyte, 175 Fed., 866 45
In re Pincus, 147 Fed. Rep., 621 45

9. Talcott by filing his claim for the purchase price and having it allowed in the bankruptcy proceeding waived his right to sue in tort 48-52
Adler v. Fenton, 24 How., 407, 411 48
Crawford v. Burke, 195 U. S., 176 51
Lincoln v. Claflin, 7 Wall., 132, 137 48
Simon v. Goodyear Metal Rubber Shoe Co., 105 Fed. Rep., 573 51
Sigafus v. Porter, 179 U. S., 116 50
Smith v. Bolles, 132 U. S., 125 50
Tindle v. Birkett, 205 U. S., 183 51-52

10. Talcott's claim was merged in the order allowing the same in the Bankruptcy Court 52-58
Barth v. Loeffelholtz, 108 Wis., 562, 571 54
Bowen v. Mandeville, 95 N. Y., 237, 241 50
Brumback v. Flower, 20 Ill. App., 219 58

Cayius v. New York, Kingston & Syracuse R. R. Co., 76 N. Y., 609 55
Karr v. Barstow, 24 Hl., *580, *582 59
Kuehling v. Leberman, 2 Wkly, N. C. (Pa.), 616 58
Mitchell v. Mayo, 16 Hl., 83, 84 58
Morgan v. Skidmore, 3 Abb. N. Cas. (N. Y.,) 92, 102 56-57
Wheeler v. Dawson, 63 Hl., 54 58
11. Talcott's claim was provable and dischargeable in bankruptcy 62-69
Crawford v. Burke, 195 U. S., 176 62-63
Tindle v. Birkett, 205 U. S., 183 62-63

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 155

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT.

In Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

This case is before the court on *certiorari* to the Court of Appeals for the 7th Circuit.

The petitioners were partners as Friend, Moss & Morris and we will so designate them.

Talcott brought an action at law against Friend, Moss & Morris in the Circuit Court for the Northern District of Illinois. (Rec., 3.)

The gist of the supposed cause of action set up in Talcott's declaration is that Friend, Moss & Morris knowingly made a false financial statement to Woods

Commercial Agency; that Talcott sold them goods in reliance upon such statement; and that a portion of the purchase price of such goods remains unpaid. (Rec., 3-6, 9-10.)

Friend, Moss & Morris pleaded (Rec., 6-8) that they had been adjudged bankrupts; that Talcott in the bankruptcy proceeding filed his claim and had it allowed; that they offered a composition in bankruptcy to their creditors, which was confirmed and they were discharged.

They filed an additional plea (Rec., 13-16), in which they averred that they were adjudicated bankrupts; that they offered a composition to their creditors; that Talcott filed objections to the confirmation of the composition; that among his objections was specification No. 8 which (Rec., 14) set up their statement to Woods Commercial Agency; that such statement was communicated to Talcott and others; that Talcott and others sold and delivered goods to them in reliance upon such statement; and that the statement was false. In said additional plea they also averred (Rec., 15) the decree of the bankruptcy court overruling said objections and confirming the composition, and they averred (Rec., 16) that all matters and things alleged in the declaration had been already litigated and adjudicated by the District Court. They amended this plea (Rec., 23-24) by further averring that Talcott objected to the confirmation of the composition on the ground that the court should refuse to confirm the same because the court ERRED in holding that the supposed false statement made to Woods Commercial Agency, as set forth in specification No. 8, was not a ground for

opposing such confirmation and could not be received in evidence for that purpose and that Talcott was not entitled to offer evidence under that objection.

Talcott replied double (Rec., 17) to said additional plea, and, among other things (Rec., 18), averred that the referee and court held that Section 14-b (3) of the Bankruptcy Act required "the materially false statement in writing" to be made directly to the creditor; that therefore the allegations in specification No. 8 (being to the effect that the alleged false statement was made to a commercial agency), were insufficient. Talcott therefore averred that the matters and things alleged in the declaration were not litigated in and adjudicated in the bankruptcy proceeding. (Rec., 18.)

The cause was heard by the Circuit Court without a jury upon the issue of former adjudication raised by the pleadings (Rec., 20); and the court made its finding of facts (Rec., 20), in substance, to the following effect:

That Friend, Moss and Morris were adjudicated bankrupts; that Talcott entered his appearance in the bankruptcy proceeding and filed his claim therein for $3,204.91, on account of the goods sold and delivered by him to them, as in the declaration mentioned; that his claim was allowed for $3,204.91; that they offered terms of composition to their creditors; that Talcott filed specifications of objection to the confirmation of the composition, among them being specification No. 8, hereinbefore referred to; that such specifications were referred to a referee; that the referee reported that specification No. 8 was insuffi-

discharge," and not as meaning that they were in fact not guilty of such acts, inasmuch as the Bankruptcy Court held that Talcott's specification No. 8 against the confirmation of the composition was insufficient and excluded evidence in regard to the financial statement to Woods Commercial Agency.

3. The liability of Friend, Moss & Morris to Talcott was not discharged by the confirmation of the composition, because:

(a) The cause of action for deceit was not a provable debt in bankruptcy.

(b) Even if it were a provable debt, it was excepted from the operation of a discharge (and consequently of a composition) by the second exception in Section 17 of the Bankruptcy Act.

We maintain that the judgment of the Circuit Court was right and that the judgment of the Court of Appeals was wrong; and we respectfully submit:

First: That each and every proposition of law stated or implied in the opinion of the Court of Appeals is fundamentally erroneous in principle.

Second: That in so far as such propositions have been passed upon by this Court, the conclusions of the Circuit Court of Appeals are in direct conflict with those reached by this Court.

Errors Relied On.

The Court of Appeals erred in reversing the judgment of the Circuit Court.

BRIEF OF THE ARGUMENT.

I.

Talcott has had his day in court on the issue as to whether or not his claim is barred by the discharge in bankruptcy of Friend, Moss & Morris, and they ought not to be twice vexed with the same controversy.

1. Talcott appeared in the Bankruptcy Court and filed in the bankruptcy proceeding his objections to the discharge in bankruptcy of Friend, Moss & Morris, among which objections was Specification No. 8, in which he set up identically the same facts which he now sets up in support of his contention that the discharge of Friend, Moss & Morris is no bar to his present suit; and showing further that the Bankruptcy Court considered his objections and found "that the bankrupt had not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge;" and therefore confirmed the composition.

Infra, pages 13-19, 33-42. Rec., 6 to 8; 13 to 16; 19 to 22.

2. The business between Talcott and Friend, Moss & Morris was all partnership business; the supposed financial statement relied on by Talcott was made by or on behalf of them as a partnership; and their discharge in bankruptcy was of them as partners.

Infra, pages 16 to 19.

In Re Bertenshaw, 157 Fed., 363; dissenting opinion of Judge Hook.

Vaccaro v. *Security Bank* (C. C. A., 6th Cir.), 103 Fed., 436.
Dickas v. *Barnes* (C. C. A., 6th Cir.), 140 Fed., 849.
Tumlin v. *Bryan* (C. C. A., 5th Cir.), 165 Fed., 166.
In Re Purley & Hays, 138 Fed., 927.
In Re Forbes, 128 Fed., 137.
Francis v. *McNeal* (C. C. A., 3d Cir.), 186 Fed., 481.

3. Talcott on the one side and Friend, Moss & Morris on the other side cannot be divided into different parts or capacities so as to say that the adjudication of the Bankruptcy Court was binding upon one part or capacity and not binding upon the other part or capacity.

Infra, pages 29 to 30.
24 Am. & Eng. Enc. of Law, 735.
Corcoran v. *C. & O. Canal Co.*, 94 U. S., 741, 745.
United States v. *California, etc., Co.*, 192 U. S., 355, 357.
24 Am. & Eng. Enc. of Law, 737.

4. Talcott invoked the jurisdiction of the Bankruptcy Court to hear and determine whether or not Friend, Moss & Morris should be denied a discharge in bankruptcy because they had obtained from him property on credit by means of a materially false statement in writing, and he is therefore bound by the adjudication of the Bankruptcy Court on that issue.

Infra, pages 31 to 33 and 60 to 62.
Starbuck v. *Starbuck*, 173 N. Y., 503.

Hewitt v. *Northrup*, 75 N. Y., 506, 510.
11 Am. & Eng. Enc. of Law, 446, 447.

5. While the precise cause of action set forth in Talcott's present declaration may not have been involved in the bankruptcy proceeding, nevertheless the precise issue as to the effect upon a discharge of the facts relating to the statement to Woods Commercial Agency was involved in the bankruptcy proceeding as well as in the present action; and there is therefore such a *res adjudicata* as is known as an estoppel by verdict.

Infra, pages 13 to 25.
24 Am. & Eng. Enc. of Law, 714.
Southern Pacific R. R. Co. v. *United States*, 168 U. S., 1, 48.
24 Am. & Eng. Enc. of Law, 780.
Stone v. *United States*, 64 Fed., 667, 670.

6. The adjudication was no less conclusive because it was upon a question of law rather than upon a question of fact.

Infra, pages 13 to 15 and 26 to 27.
Bissel v. *Spring Valley Township*, 124 U. S., 225, 232.
24 Am. & Eng. Enc. of Law, 799.
Gould v. *Evansville, etc., R. R. Co.*, 91 U. S., 526, 533.
Northern Pacific R. R. Co. v. *Slaght*, 205 U. S., 122.

7. The conclusive effect of the adjudication is not destroyed by the fact, if it be a fact, that the decree of the Bankruptcy Court was erroneous.

Infra, pages 45 to 47.

Gunter v. Atlantic Coast Line, 200 U. S., 273, 290.

Deposit Bank v. Frankfort, 191 U. S., 499, 510.

II.

The record of the bankruptcy proceedings evidenced an election of remedies by respondent, which barred his suit for fraudulent representations.

1. By filing a claim for goods sold and thus affirming the contract, respondent waived all claims for deceit.

Infra, pages 48 to 52.

Pindle v. Birkett, 205 U. S., 183.

Adler v. Fenton, 24 How., 407.

Lincoln v. Claflin, 7 Wall., 132.

Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. Rep., 513.

2. The judgment of the Bankruptcy Court allowing his claim for goods sold, operated as a merger of all his causes of action.

3. A judgment merges not only the cause of action sued on but all concurrent remedies, even if consistent.

Infra, pages 53 to 58.

Barth v. Loeffelholtz, 108 Wis., 562.

Caglus v. N. Y., K. & S. R. R. Co., 76 N. Y., 609.

Bowen v. Mandeville, 95 N. Y., 237.

Morgan v. Skidmore, 3 Abb. N. Cas. (N. Y.), 92.

Brumbach v. Flower, 20 Ill. App., 219.

Kerr v. Barstow, 24 Ill., *386.

b. The order of a court of bankruptcy allowing a claim is a judgment.

Infra, page 58 to 59.

Kuehling v. *Leberman*, 2 Wkly. N. C. (Pa.), 616.

Mitchell v. *Mayo*, 16 Ill., 83.

Wheeler v. *Dawson*, 63 Ill., 54.

c. That such judgment is not so efficient as another remedy might be, does not change the rule.

Infra, page 59.

Karr v. *Barstow*, 24 Ill., 580.

3. By appearing in the bankruptcy proceedings and opposing the discharge of Friend, Moss & Morris, Talcott elected to treat his claim as one not excepted from the operation of a discharge in bankruptcy.

4. By taking the position in the Bankruptcy Court that the statement to Woods Commercial Agency was a false statement sufficient to bar a discharge, Talcott elected to submit to that forum the effect of such statement on all his rights against Friend, Moss & Morris.

III.

The order confirming the composition discharged Friend, Moss & Morris from Talcott's claim.

1. Talcott's claim was provable.

Infra, pages 62 to 69.

Crawford v. *Burke*, 195 U. S., 176.

Tindle v. *Birkett*, 205 U. S., 183.

2. It is not excepted from the operation of a discharge.

Tindle v. *Birkett*, 205 U. S., 183.

3. The view that a claim based upon a false statement in writing is not barred by a discharge (a) is destructive of the objects of the bankruptcy law; (b) involves the attribution to Congress of an intention to permit the same point to be twice litigated, and to allow the judgments of courts of bankruptcy to be collaterally attacked; (c) involves the proposition —which Talcott is estopped to urge—that he had no right to appear in opposition to the composition.

Bankruptcy Act 1898 (as amended 1903), sections 14b, 17.

4. Even if it be assumed that Congress intended to give to a creditor to whom a false statement in writing had been made, the option either to oppose a discharge or to sue notwithstanding a discharge, Talcott exercised such option by appearing in the Bankruptcy Court.

The confirmation of a composition has the same effect as a discharge.

Bankruptcy Act 1898, section 14c.

ARGUMENT.

I.

Talcott has had his day in court on the issue as to whether or not his claim should be barred by the discharge in bankruptcy of Friend, Moss & Morris, and they ought not to be twice vexed with the same controversy.

In asking that the proposed composition be confirmed, Friend, Moss & Morris asked the Bankruptcy Court to discharge them from their provable debts, including their debt to Talcott. Talcott appeared in the bankruptcy proceeding and set up that they were not entitled to such discharge, for the very same reasons, based upon the very same facts, which he now sets up in support of his contention in the case at bar that his claim against them is not barred by their discharge.

It is true that, in the bankruptcy proceeding, the issue raised by Talcott's objection was that Friend, Moss & Morris were not entitled to a discharge from any of their provable debts and obligations, but that included their debt or obligation to Talcott, as the greater includes the less. If Talcott had succeeded in his contention in the Bankruptcy Court, Friend, Moss & Morris would have procured no discharge which they could plead in bar of any suit he might bring to recover the amount due him.

It is also true that in the bankruptcy proceeding

there was no disputed question of fact; but Talcott in his specification No. 8 set up the same facts as barring the discharge, which he now contends make the discharge ineffectual as against his claim. They in effect demurred to specification No. 8, thereby admitting the facts to be as averred; and the court held that the facts so admitted were, as a matter of law, insufficient to bar the discharge. Thus, the Bankruptcy Court did actually pass judgment upon that issue between the parties; and such judgment, whether erroneous or not, is, until reversed, conclusive on that issue between the parties, wherever and however the same may arise.

Counsel for Talcott have argued that there is no *res adjudicata* or estoppel by verdict, because the issue in the Bankruptcy Court was not disposed of on its merits. The vice of this argument is that it erroneously assumes that the hearing in the Bankruptcy Court was not on the merits. It is true that there was no issue of fact tried in that court. But the facts on which Talcott now relies were fully set up; the Bankruptcy Court considered them; and reached the conclusion that they were insufficient to prevent the confirmation of the composition and bar the discharge of Friend, Moss & Morris. That surely was an adjudication upon the merits.

Suppose that the Bankruptcy Court had held that specification No. 8, if true, was sufficient to bar the discharge of Friend, Moss & Morris; that the Court had heard the evidence of the parties under that specification and had found that Friend, Moss & Morris did not make or authorize the statement, or that the

statement when made was true; and on that ground or on any other ground had reached the conclusion that specification No. 8 was not well founded in point of fact; and therefore had adjudged that such specification was insufficient to bar the discharge. Would any one pretend that such adjudication was not binding upon Talcott and that he could in a subsequent proceeding show that the conclusion of the Bankruptcy Court was erroneous? And what possible difference does it make on the question of former adjudication that the Bankruptcy Court held specification No. 8 insufficient as a matter of law?

A strict *res adjudicata* applies where the subsequent suit is upon the identical cause of action involved in the former suit; in such case, all questions, regardless of whether they were actually considered or not, are settled by the judgment in the former suit. An estoppel by verdict applies where the second suit is not upon the identical cause of action as the former suit, but involves an issue between the same parties which was involved in the former suit; in such case, the judgment in the former suit is an adjudication as to what was actually heard and determined therein.

In our view the result in the case at bar is the same, whether we rely on the rule of strict *res adjudicata* or on the rule of estoppel by verdict, because the issue as to the right of Francis, Moss & Morris to a discharge in bankruptcy as against the claim of Talcott was actually heard and determined in the bankruptcy proceeding. We will, therefore, sometimes refer to the decree of the Bankruptcy Court, in general terms, as an adjudication.

An estoppel by verdict is not limited to settlement of disputed questions of fact, but covers issues of law as well as issues of fact. The only questions are, was the issue made between the parties, did the court have jurisdiction to entertain it, and did the court decide it? Is there any less an estoppel by verdict because the facts are admitted by demurrer or by stipulation or in some other way? We submit not, as appears from the authorities we have cited and will cite.

Counsel for Talcott have argued that there was no adjudication because it cannot be ascertained whether the Bankruptcy Court held the statement to Woods Commercial Agency insufficient to bar a discharge on the grounds (a) that no such statement was made; or (b) that it was immaterial; or (c) that it was false, or for some other reason. But the record affirmatively shows that the Bankruptcy Court held the statement was insufficient because it was made to a commercial agency and not directly to Talcott. Furthermore, all the facts relating to such statement were set up in specification No. 8; they were for the purpose of the hearing admitted; and the court held them to be insufficient as a matter of law. Hence, the adjudication of the Bankruptcy Court covered the identical state of facts on which Talcott now relies as making the discharge ineffectual.

Counsel for Talcott have also argued that the discharge included only the partnership entity and did not embrace Friend, Moss & Morris as partners or individuals. We cannot permit to stand unchallenged a proposition that a discharge in bankruptcy

of a partnership leaves unaffected the liability of its members. It is *not* the law that the discharge of a copartnership does not also discharge the members of the firm from their copartnership obligations.

In support of their contention counsel have cited as their main authority the case of *Re Bertenshaw*, 157 Fed., 363. In that case the sole question presented for review was whether or not, in proceedings wherein a copartnership was adjudged a bankrupt but the individual members were not so adjudicated, the trustee of the copartnership could seize and administer upon the assets of the individual members not so adjudicated. Judge Sanborn, who wrote the opinion in the *Bertenshaw* case, held that the trustee could not exercise these acts, and committed himself to the heresy that a copartnership could be insolvent irrespective of the solvency of the members of the firm constituting the copartnership, and as a corrollary thereto and by way of *obiter*, the learned judge remarked that a discharge of a copartnership did not discharge the individual members of the firm from liability for copartnership obligations.

The doctrines thus enunciated by Judge Sanborn are opposed to the great weight of authority, as shown by the cases of *Vaccaro* v. *Security Bank* (C. C. A., 6th Cir.), 103 Fed., 436, *Dickas* v. *Barnes* (C. C. A., 6th Cir.), 140 Fed., 849, *Tumlin* v. *Bryan* (C. C. A., 5th Cir.), 165 Fed., 166, *Re Purley and Hays*, 138 Fed., 927, *Re Forbes*, 128 Fed., 137; and the latest case, *Francis* v. *McNeal* (C. C. A., 3rd Cir.), 186 Fed., 481. In the case last cited the court distinctly held that there can be no adjudication against a co-

partnership unless it and all of its members are insolvent, and that in such case, though the adjudication be against the copartnership only or against the copartnership and some but not all of its members, the estates of all the members are drawn into the proceedings for administration and that the trustee can seize and administer upon the same, and severely criticized the reasoning of Judge Sanborn.

We also refer the court to the strong dissenting opinion, in the *Bertenshaw* case, written by Judge Hook.

But Friend, Moss & Morris dealt as a partnership and not as individuals with Talcott. The statement to Woods Commercial Agency was signed on behalf of the firm and not by the individuals. In fact, Talcott's declaration is fatally defective as a suit against them as individuals, because it shows that the supposed false statement on which he relies was made by or on behalf of the partnership, and there is no averment showing whether Friend, Moss or Morris or either of them signed the same. The whole business was a partnership transaction carried on in their firm name, and not the individual transaction of any or either of them.

That the Bankruptcy Court had jurisdiction to hear and decide the issue raised by Talcott's specification in opposition to the composition cannot, and we anticipate will not, be seriously denied. Indeed, Talcott himself invoked the jurisdiction of the Bankruptcy Court to hear and decide that issue. His counsel, in their brief in opposition to our petition for a *certiorari*, conceded that the adjudication of

the Bankruptcy Court is conclusive that the facts relied on by Talcott were insufficient to bar the confirmation of the composition. Since their discharge in bankruptcy necessarily results, as a matter of law, from the confirmation of the composition, it follows that the adjudication of the Bankruptcy Court is likewise conclusive that the facts relied upon by Talcott are insufficient to bar the discharge of Friend, Moss & Morris.

The attempt to divide Talcott on the one side and Friend, Moss & Morris on the other side into different capacities is, as it seems to us, too subtle a refinement for practical purposes, the object of the law being the practical administration of justice. Such attempt implies that Talcott could be present in the Bankruptcy Court, insisting upon the allowance of his claim for the purchase price of the merchandise which he sold Friend, Moss & Morris, and at the same time be absent as the individual who sold these same goods to Talcott in reliance on the statement to Woods Commercial Agency; that Friend, Moss & Morris could be present in the Bankruptcy Court as the purchasers of such merchandise and be absent as the persons who made the statement to Woods Commercial Agency in reliance upon which it is claimed the goods were sold. This reasoning seems too scholastic. It reminds us of the bishop who was also a duke, who hoped to escape the penalty for profane swearing by insisting that he swore as duke and not as bishop. On the final judgment against the duke what becomes of the bishop?

The plain truth is that Talcott had let Friend, Moss & Morris have some of his

goods and he wanted to get his pay for them. Friend, Moss & Morris had become financially involved. They were unable to pay their obligations in full. Therefore, they proposed, by way of composition, to distribute their assets ratably among their creditors and get their discharge in bankruptcy. Talcott contended in the Bankruptcy Court, as he contends in the case at bar, that under the existing facts they ought not to be discharged. They contended in the Bankruptcy Court, as they are contending here, that under the existing facts they ought to be discharged. Talcott in the Bankruptcy Court, as well as in the case at bar, appeared for and represented his own claim; that he also, in the Bankruptcy Court, represented the other creditors cannot affect the question before the court. Friend, Moss & Morris in the Bankruptcy Court appeared for and represented themselves and sought a discharge from Talcott's claim; that they also sought a discharge from other claims is immaterial.

The Court of Appeals in its opinion takes the positions: (a) That Talcott by filing his claim for the purchase price of the merchandise did not waive his cause of action for the supposed tort in obtaining the goods on the statement to Woods Commercial Agency; and (b) that his cause of action for the supposed tort was not provable in bankruptcy, or, if provable, was not dischargeable. Whether or not such positions are sound will be considered at another place in this argument; but whether they are sound or not, the fact remains that Talcott did have a provable claim for such purchase price and he

proved the same in the bankruptcy proceeding. Thus, he clearly had a standing in the Bankruptcy Court.

Section 14-b of the Bankruptcy Act reads, in part, as follows:

> "The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto *by parties in interest*, at such time as will give *parties in interest* a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless," etc.

Talcott insisted upon being heard in the Bankruptcy Court in opposition to the discharge of Friend, Moss & Morris. Thus, he took his stand as a party in interest. He was recognized as such by the Bankruptcy Court and all the other parties in interest. It was a proper issue in that proceeding whether Friend, Moss & Morris had obtained property on such a materially false statement in writing as would bar their discharge from their debts. Talcott raised that issue and at his instance it was heard and determined.

Suppose Friend, Moss & Morris had given Talcott two notes, one due in one year and the other in two years, for the goods he let them have; that Talcott sued them upon the one year note; that they pleaded their discharge in bankrutpcy; that Talcott set up the identical facts which he set up in the Bankruptcy Court and sets up in the case at bar, as precluding the bar of the discharge; that upon a hearing on demurrer, or on a stipulation of facts, whereby the facts were admitted or by any other form of trial, the court adjudicated that such facts were legally

insufficient to preclude the bar of the discharge as against such one year note: Would not such judgment be an adjudication against Talcott in a subsequent suit by him upon the second year note? And wherein is the material difference, in point of law, between the adjudication in the Bankrutpcy Court and the adjudication in the case we have supposed?

If Talcott had succeeded in his contention in the Bankruptcy Court and that court had adjudged that the facts set up by him were sufficient to bar their discharge, such adjudication would have been binding upon them and would have established the right of Talcott to proceed against them, notwithstanding the bankruptcy proceedings. Why should such adjudication be binding upon them and not binding upon Talcott? The rights of the parties should be reciprocal in this regard.

The vital point to which Talcott's objections in the bankruptcy proceeding were directed was to prevent Friend, Moss & Morris from getting a discharge; that is to say, Talcott would not have objected to the ratable distribution of their assets among all their creditors, provided they were not discharged but still remained liable to him for the amount he claimed. By his objections to the confirmation of the composition he virtually asked the court to decide whether in view of the facts he set up his claim should be discharged.

The statute is not that the judge *shall confirm the composition* unless the bankrupt has obtained property on credit on a materially false statement in writing; but the statute is that the judge *shall dis-*

charge the applicant unless he has obtained property on credit on a materially false statement in writing.

Suppose the court had sustained Talcott's specification in opposition to the confirmation of the composition and had refused to confirm such composition, and that thereafter the bankrupts had applied for their discharge in bankruptcy: Can there be any doubt that the adjudication in favor of Talcott on his specification would be binding and conclusive against the bankrupts on their later application for a discharge?

The logical result of Talcott's contention seems to be that Friend, Moss & Morris staked everything on the adjudication of the issue so raised by Talcott, but that he staked nothing on such adjudication; that if he won he gained everything he wanted and contended for; and that if he lost he lost nothing. We submit that such a position is not fair, just or legal. The adjudication ought to be equally binding on both the parties.

Can it be said that the Bankruptcy Court had no jurisdiction; *i. e.*, no power to hear and determine whether or not Talcott's claim should not be barred by a discharge? As we have before said, Talcott himself is in no position to make that contention, because he raised that issue in the Bankruptcy Court; he himself invoked that jurisdiction. Aside from that, it seems clear that under the law the Bankruptcy Court did have such jurisdiction.

So we respectfully urge that Talcott has had his day in court on this issue; and that Friend, Moss &

Morris ought not to be vexed and harassed by a relitigation of the same question.

Authorities and arguments showing that the decree of the Bankruptcy Court constitutes an adjudication binding upon Talcott that the supposed statement to Woods Commercial Agency, even if false, was insufficient to bar the discharge of Friend, Moss & Morris.

1. THE EFFECT OF A FORMER ADJUDICATION.

In *Jeter* v. *Hewitt*, 22 How., 352, the court, at page 364, said:

> "*Res adjudicata* renders white that which is black and straight that which is crooked. *Facit ex curvo rectum ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

2. THERE IS HERE SUCH AN ADJUDICATION AS IS KNOWN AS AN ESTOPPEL BY VERDICT.

The principle of law, on which we rely, is stated in 24 Am. & Eng. Enc. of Law, at page 714, as follows:

> "The difference between the effect of a judgment as a bar to the prosecution of a second action upon the same claim or demand, and its effect where the subsequent action involves a different cause of action or claim, is often overlooked, with the result that the law is sometimes misapplied. In an action upon the same claim or demand the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which

might and should have been litigated in the first suit; *while in an action upon a different claim or demand only those facts or matters are conclusively established by the former adjudication which are essential to, or shown to be involved in, the judgment or decree rendered. These two phases of the subject are often denominated estoppel by judgment and estoppel by verdict respectively.*"

Such rule as to "estoppel by verdict" is recognized and applied in *Southern Pacific R. R. Co.* v. *United States,* 168 U. S., 1, where the court say, beginning near the bottom of page 48:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In 24 Am. & Eng. Enc. of Law on page 780 it is said:

> "If an issue presented in a subsequent suit

between the same parties or their privies is shown to have been determined in a former one, the question is *res judicata*, although the actions are based on different grounds, or tried on different theories, or are instituted for different purposes and seek different relief. The test of identity is found in the inquiry whether the same evidence will support both actions."

In *Stone* v. *United States*, 64 Fed., 667, the Court of Appeals for the Ninth Circuit said on page 670:

"One of the safest rules for courts to follow in determining whether a prior judgment between the same parties, concerning the same matters, is a bar, is to ascertain whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein."

3. AN ADJUDICATION UPON DEMURRER IS AS CONCLUSIVE AS AN ADJUDICATION UPON VERDICT.

In *Bissel* v. *Spring Valley Township*, 124 U. S., 225, the action was upon railroad aid bonds purporting to have been issued by the township. The defendant pleaded an adjudication in a former action upon some interest coupons on the bonds, to the effect that the bonds were not executed as required by law. Such former adjudication was made upon demurrer to a plea and the plaintiff therefore claimed it was not conclusive in the subsequent action.

But the Supreme Court overruled such claim and said, beginning near the bottom of page 232:

"The law on this subject is well stated in Goulds Treatise on Pleading, a work of recognized merit in this country, as follows: 'A judgment rendered upon demurrer is equally con-

clusive (by way of *estoppel*) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well in the former case as in the latter, by way of *record*. And the facts, thus established, can never afterwards be contested between the same parties or those in privity with them."

Where a judgment upon demurrer is based upon a formal or technical defect in pleading, it cannot be made available as *res judicata*, but it is otherwise where, as in the case at bar, the merits are involved.

In 24 Am. & Eng. Enc. of Law at page 799 it is said:

"But a judgment on demurrer will constitute *res judicata* where it goes upon the merits of the case; that is, where the demurrer is sustained and judgment entered for the demurring party on the ground that the opposing party has not shown a good cause of action, or defense, or where the demurrer is overruled and judgment entered for the opposing party on the facts as confessed by the demurrer."

In *Gould* v. *Evansville, etc., R. R. Co.*, 91 U. S., 526, the court, beginning near the bottom of page 533, said:

"From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after

be contested between the same parties or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless."

4. IT IS NO ANSWER TO SAY THAT FRIEND, MOSS & MORRIS APPEARED IN THE DISTRICT COURT IN THEIR CAPACITY AS CONTRACTORS, WHILE IN THE CASE AT BAR THEY APPEARED IN THEIR CAPACITY AS ALLEGED FRAUDDOERS; OR THAT TALCOTT APPEARED IN THE BANKRUPTCY COURT IN THE CAPACITY OF REPRESENTING NOT ONLY HIMSELF BUT THE OTHER CREDITORS, WHILE IN THE CASE AT BAR HE APPEARED IN THE CAPACITY OF REPRESENTING ONLY HIMSELF.

We respectfully submit that the settled principles of law and the authorities are against dividing (as the Court of Appeals has attempted to do) the several parties to a litigation into different parts, i. e., capacities, and making an adjudication binding upon one of such parts and not binding upon the other. It might as well be said, as it seems to us, that an adjudication is binding upon the head of a party and not upon his feet.

In 24 Am. & Eng. Enc. of Law, 735, it is said:

"But where a person appears in a suit in both an individual and a representative capacity the judgment will conclude him in both capacities."

In Corcoran v. C. & O. Canal Co., 94 U. S. 741, it is said on page 745:

> "It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree.
>
> But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds, and for that reason he was made a party, and he lawfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the cestui qui trust is not bound by the decree against his trustee in the very suit or the very trust to which he was appointed. If Corcoran owned any of these bonds and coupons then, in a limited sense, he was representing himself. So he brought them here, he is bound as privy to the person who was represented. Kinnon v. Gaines, Stewart et al., 27 U. S. 706, and the authorities there collected."

In United States v. Candelaria, 271 U. S. 432, the court said, beginning at the bottom of page 437:

> "On the general principle of the law it is readily plain that the decree in the suit under the foregoing statute would be a bar. The parties, the subject matter and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself; here it sues on behalf of the Indians. But one is not free in any sense to bring legal antithesis. It would be true of a suit by an executor or administrator with a suit by the same person in his own behalf. But that is because in theory of law the executor embraces the persons of the testator and those

fore is a different person from the natural man who fills the office. This is recognized in *Leggott* v. *Great Northern Ry.*, 1 Q. B. D., 599, 606, cited for the United States. Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. See *Werlein* v. *New Orleans,* 177 U. S., 390, 400, 401. The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States put forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish it own title to the fee."

In 24 Am. & Eng. Enc. of Law at page 737, it is said:

> "One who prosecutes or defends a suit in the name of another to establish or protect his own right, or who assists in the prosecution or defense in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it as an estoppel against an adversary party, as he would be if he had been a party to the record."

Of course, there is even stronger reason for saying that there is an estoppel against a party who sets up his individual rights in his own name, even if such rights are also for the benefit of others similarly situated.

5. TALCOTT CANNOT DENY THE JURISDICTION OF THE BANKRUPTCY COURT TO ADJUDGE THAT FRIEND, MOSS & MORRIS WERE ENTITLED TO THEIR DISCHARGE, NOTWITHSTANDING THEIR STATEMENT TO WOODS COMMERCIAL AGENCY, BECAUSE HE INVOKED SUCH JURISDICTION.

Perhaps it is unnecessary to raise this point, since it seems the Bankruptcy Court clearly had jurisdiction. But Talcott, as it seems to us, occupies a strange position in regard to this matter. He filed his claim in bankruptcy and had it allowed. How can he now say it was not a provable debt? He set up the statement to Woods Commercial Agency as sufficient to prevent the composition and bar the discharge of Friend, Moss & Morris. How can he now say that such statement was not sufficient for that purpose; that his specification No. 8 ought not to have been filed; and that its only effect was to give him an individual action against them, which would not be barred by the discharge. He may have been under no compulsion to set up this matter in the Bankruptcy Court; but having done so and procured a judgment of that court on the issue, we submit he is for that reason, if for no other, bound by it.

Of course, it will be borne in mind that the Bankruptcy Court did not refuse to entertain Talcott's contention on the ground that it had no jurisdiction. On the contrary, it heard and determined such contention, holding that the statement to Woods Commercial Agency was not the kind of statement which Congress intended should bar a discharge in bankrutcy.

In *Starbuck* v. *Starbuck*, 173 N. Y., 503, the underlying principle on which the opinion rests is stated at page 506, as follows:

> "The principle is well established that, where a party has procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he cannot thereafter be heard to question the jurisdiction of the court which entered the judgment or decree."

In *Hewitt* v. *Northrup*, 75 New York, 506, the Court of Appeals of New York said on page 510:

> "But the claim is further made that the Supreme Court is not the court to determine the amount and validity of debts, nor to marshal the assets of a bankrupt, and that the proper parties are not here for that purpose. But the plaintiffs went into that court, and invoked its jurisdiction, and brought in just such parties as they deemed proper, and they cannot now complain that the court determined all the questions needful for a proper disposition of the case."

Talcott assumed a position in the bankruptcy proceeding; that is, that the Bankruptcy Court had jurisdiction to hear and determine whether or not the statement to Woods Commercial Agency was sufficient to bar the discharge in bankruptcy of Friend, Moss & Morris. He succeeded in maintaining that position; that is to say, he succeeded in having the Bankruptcy Court consider and determine that question. That the Bankruptcy Court decided such question against him does not militate against the proposition that the court whose jurisdiction he invoked decided the very question which he asked that court to decide.

In 11 Am. & Eng. Ency. of Law, at page 446 and 447, it is said:

> "It has been laid down as a general proposition, that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

6. THE CONTROLLING ISSUE IN THE CASE AT BAR WAS HEARD AND DETERMINED IN THE BANKRUPTCY PROCEEDING.

So far as Talcott is concerned, there is no substantial difference between the issue involved in the bankruptcy proceeding and the issue involved in the case at bar. The form in which the issue is presented may be different, but the issue itself is essentially the same.

Such issue is whether Friend, Moss & Morris were entitled to be relieved from further liability to Talcott, or whether Talcott's claim against them should continue as an existing cause of action. No doubt in the bankruptcy proceeding there was involved not merely the liability of Friend, Moss & Morris to Talcott, but their liability to all their other creditors; but the question of their liability to Talcott was included in the question of their liability to all their other creditors. Talcott's interest in the latter question was confined to their liability to him. To say, as the Court of Appeals did, that the only issue in the bankruptcy proceeding was the right of the bankrupts to a discharge as against all par-

ties in interest, and hence that the adjudication is not binding on the objecting creditor is to limit the principle of *res adjudicata* to matters of mere form.

For convenience of procedure, the Bankruptcy Court, treating all creditors as a class, does not permit the right to a discharge to be litigated between the bankrupt and each creditor separately. In substance, however, the court, in passing upon an application for discharge, determines the bankrupt's right to be relieved from further liability to each of his creditors.

Section 14-b of the Bankruptcy Act, as amended in 1903, confers no rights of action upon the creditors; but it does prescribe the conditions under which the bankrupt shall not be entitled to a discharge from his obligations to his creditors generally. Section 17 of such act, as amended in 1903, does not confer upon any creditor a right of action; but it does prescribe the conditions under which the bankrupt shall not be discharged from his obligations to the particular creditor, whose property has been obtained by false representations.

Section 17 deals with the *genus; i. e.*, "obtaining property by false pretenses or false representations." Section 14-b deals with a *species; i. e.*, "obtaining property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." But the *species* set forth in Section 14-b is evidently all-inclusive of that particular *species* of false representation.

Perhaps a creditor whose property has been ob-

tained by means of a materially false statement in writing is not obliged to appear in the Bankruptcy Court and set up such fact in opposition to the discharge of the bankrupt; and that in such case the adjudication of the Bankruptcy Court would not be binding upon him. And it may be that if some other creditor, without his consent, alleged such fraud in the bankruptcy proceeding, the adjudication of the Bankruptcy Court would not preclude him from claiming that under Section 17 his cause of action was not barred by the discharge in bankruptcy. But the creditor who claims that his property has been obtained by a materially false statement in writing unquestionably has the privilege of appearing in the bankruptcy proceeding and there setting up that his claim, as well as the claims of other creditors, are not and should not be barred by a discharge. The question is: What is the effect of the adjudication where the creditor who claims to have been defrauded *actually appears* in the Bankruptcy Court and litigates the issue; and not what would be the effect if such creditor stayed out of the Bankruptcy Court.

Such creditor has an election of remedies—perhaps it would be more accurate to say that he has a choice of forums. He may go to the Bankruptcy Court and have it determine in advance under Section 14-b that there shall be no discharge to bar his claim; or he may stay out of the Bankruptcy Court and say that under Section 17 his claim is not barred by the discharge. But if he chooses to go into the Bankruptcy Court and raise the issue that because of the false statement on which he relies the

bankrupt should not be discharged, and that issue is heard and determined, the adjudication is, we respectfully submit, binding upon him and he cannot relitigate the question under Section 17.

Talcott appeared in the bankruptcy proceedings and set up that the bankrupts were not entitled to a discharge; that is to say, were not entitled to be relieved of their liability to him, because they had made a certain false statement to Woods Commercial Agency. The court decided that the bankrupts were entitled to a discharge; that is to say, that they were entitled to be relieved from their liability to Talcott.

In the suit at bar, notwithstanding this adjudication, Talcott again makes the same claim and asserts the same right, viz: that by reason of said statement to Woods Commercial Agency, Friend, Moss & Morris are still liable to him.

Talcott went into the Bankruptcy Court; he there set up his claim. He was not particularly interested in whether or not Friend, Moss & Morris were discharged from their obligations to their other creditors; he was particularly interested in having them not discharged from their obligation to him. He set up as a reason why they should not be discharged from their obligation to him the very same facts which he now claims precludes the discharge from barring his action to compel Friend, Moss & Morris to pay such obligation. We respectfully submit that the mere statement of the situation is the strongest argument that he has had his day in court on this issue.

We believe that the above contention is sustained by *Southern Pacific R. R. Co.* v. *United States*, 168 United States, 1, 48; *Bissel* v. *Spring Valley Township*, 124 United States, 225; *Gould* v. *Evansville, etc., R. R. Co.*, 91 United States, 526, 533; *Corcoran* v. *C. & O. Canal Co.*, 94 United States, 741, 745; *United States* v. *California, etc., Co.*, 192 United States, 355, 357; and the other authorities from which we have quoted *supra*.

In addition to the foregoing authorities, we call attention to *Northern Pacific Railway Co.* v. *Slaght*, 205 United States, 122.

In that case, Slaght, claiming under a homestead patent issued in 1897, brought ejectment against the railway. It defended, asserting a right of way under an act of Congress of March 3, 1875, and also a title by limitation. To meet these defenses, Slaght offered in evidence a judgment in his favor in a prior suit brought against him by the predecessor in interest of the railway. The object of the prior suit was to have Slaght declared a trustee, holding the land for the plaintiffs, to enjoin him from bringing any action against them, and to quiet their title. The ground of the prior suit was that the land was not subject to patent or to settlement or entry, except under the act of 1864 granting land to the Northern Pacific Railroad Company and plaintiffs claimed under a grant from that company. Slaght demurred to the complaint, his demurrer was sustained and judgment entered in his favor and the judgment so entered was set up by him as *res adjudicata* in the ejectment suit.

The lower courts sustained his claim and entered judgment in his favor. In affirming that judgment, this court, by Mr. Justice McKenna, said:

"The effect of the decree, it is insisted, was only to decide against the title specially set forth in the pleading and further, 'in this action [that at bar] the right asserted is a perpetual easement or way, by virtue of the act of 1875, through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved.' To sustain these conclusions the following authorities are cited: *Wiggins Ferry Company* v. *Ohio & Mississippi Company*, 142 U. S., 396, 410; *Gilman* v. *Reives*, 10 Pet., 297; Freeman on Judgments (4th Ed.), Sec. 267; Van Fleet, Form. Ad., Sec. 306, and following.

The citations are not apposite to the present controversy. It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould* v. *Evansville & Crawfordsville R. R. Co.*, 91 U. S., 526; *Bissel* v. *Spring Valley Township*, 124 U. S., 228; Freeman on Judgments, section 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated. There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand. *Cromwell* v. *County of Sac*, 94 U. S., 351; *Bissel* v. *Spring Valley Township*, 124 U. S., 225; *New Orleans* v. *Citizens Bank*, 167 U. S., 371; *Southern Pacific Railroad Company* v. *United States*, 168 U. S., 1; *Gunter* v. *Atlantic Coast Line*, 200 U. S., 273; *Deposit*

Bank v. *Frankfort*, 191 U. S., 499; and a distinction between personal actions and real actions is useful to observe. Herman on Estoppel, Sec. 92. It is there said: 'Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.'"

To contend that the District Court adjudicated only that a false statement to a mercantile agency would not bar a discharge, or only that the composition should be confirmed, is equivalent to the contention in the Slaght case that the former judgment did not adjudicate upon the right to an easement but only upon a title in fee. Indeed, the Court of Appeals, if it applied its theory to the Slaght case, would logically hold that Slaght's former judgment amounted only to an adjudication that the company was not entitled to an injunction against him. The opinion of the Circuit Court of Appeals in the last analysis, really comes to this, that the District Court merely adjudicated that an order be entered confirming the composition. This, consistently applied, would reduce the evidential force of a judgment to mere proof of its own existence.

The doctrine of *res adjudicata*, however, is not con-

cerned with particular remedies, but, as said by Mr. Justice Day in *Deposit Bank* v. *Frankfort, supra:*

> "It is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties."
>
> *Deposit Bank* v. *Frankfort*, 191 U. S., 499, 510.

The decree of the District Court embodied such a settlement of the rights of the parties. Just as in the Slaght case the former judgment denied for all time to the railway and its privies, any right, however derived, to retain the property; so the judgment of the District Court denied for all time to Talcott any right, however derived, to retain his claim against petitioners.

Within the true meaning of the distinction pointed out by Mr. Justice McKenna in the Slaght case, between real and personal actions, the bankruptcy proceeding was a real action. The hearing on the composition involved not mere claims, but rights of property—not, it is true, rights of property in land or chattels, but the right of property of the several creditors of petitioners in their several obligations. The creditors who opposed the discharge were not seeking to enforce their obligations as such; if the court had refused a discharge, it could not have awarded execution for the amount of their debts. What each of them sought was the preservation of his right of property in the obligation, the *vinculum juris* itself. By confirming the composition, the District Court denied the right of property so asserted

by Talcott and the other creditors who opposed the composition, extinguished their title, and confirmed to petitioners a perpetual bar to such title.

To sum up the whole matter in a few words: *Interest reipublicae ut sit finis litium.* Talcott had his day in court. He submitted his rights to his chosen forum. He must abide the result.

Tinker v. *Colwell,* 193 U. S., 473, is the only decision of this court mentioned in the opinion of the Court of Appeals on this point. (Rec., 47.) That case came before this court on a writ of error to review a judgment of a state court denying the application of a discharged bankrupt to cancel and discharge of record a judgment recovered prior to the bankruptcy in an action for criminal conversation.

It appears in the statement of facts that the judgment creditor had opposed the discharge, but neither the elaborate argument of counsel nor the opinion of the court notices the fact. Whether the judgment creditor's appearance in the bankruptcy and the adverse decision of the District Court amounted to a prior adjudication was therefore not considered; and none of the reasons urged by us in this brief would have led to a different decision in the Tinker case.

In *Tinker* v. *Colwell* there was no inconsistency between the different claims put forward by the creditor, and no question such as is here presented, with reference to the proper construction of Sections 14 and 17. But aside from that, the objections to discharge urged by the creditor there did not, as

here, involve the assumption that his debt was dischargeable, or submit to the court all his rights. On the contrary, he based his objections, as will be seen by reference to the opinion of the District Court in 99 Federal Reporter, 79, expressly on the proposition that his debt could not be discharged, and that therefore, since it was the only debt scheduled, the court had no jurisdiction to consider the application for discharge. He did not contest the bankrupt's application on the merits, but the court's jurisdiction to entertain it.

Audubon v. *Shufeldt*, 181 U. S., 575, is another decision which should be noticed. It is not altogether free from difficulty—a difficulty caused, not by anything said in the opinion, but by the nature of the order entered by this court. That order was that

> "the order granting a discharge covering arrears of alimony is reversed, and the case remanded for further proceedings consistent with the opinion of this court."

The case did not involve the right of Shufeldt to a discharge as against other creditors, but the only point argued by counsel or considered by the court was whether appellant's claim for arrears of alimony was dischargeable. If the Court of Appeals was right in saying in the case at bar that the only issue on the application for discharge was "the right to a discharge as against all parties in interest," then it might be said that this court in *Audubon* v. *Shufeldt* went outside the only issue and confused the distinction between the granting of a discharge and its operation upon particular claims.

Of course no such confusion of ideas can

be attributed either to the learned justice who wrote the opinion, or to the remainder of the court who concurred therein. The court there evidently only exercised a proper caution founded upon an appreciation of the obstruction, which an affirmance of the decree would have presented to another action by appellant. The order entered in effect permitted the lower court to grant a discharge with an express reservation of appellant's other remedies, and was thus in perfect harmony with the policy to which this court has consistently adhered, of specifically directing that the dismissal of a bill shall be without prejudice to an action at law. See *e. g.*,

Scott v. *Neely*, 140 U. S., 106, 117.

In the absence of such a qualification, the dismissal of a bill is presumed to be an adjudication against the right to proceed at law, as stated in a case reported in the same volume as *Audubon* v. *Shufeldt*.

Baker v. *Cummings*, 181 U. S., 117, 125.

If an order granting a discharge, as seems to be held by the Court of Appeals, has no bearing upon the operation of the discharge, the judgment of this court in *Audubon* v. *Shufeldt* is meaningless—a conclusion which makes us doubt the premise.

The true rule we conceive to be that a creditor who appears in the bankruptcy, not merely, as in *Tinker* v. *Colwell*, to contest the court's jurisdiction, but to oppose the discharge on the merits, thereby commits to the District Court, the fate of his rights against the bankrupt, at least so far as the identical

facts set up in the Bankruptcy Court are concerned.

We confess that we have difficulty in understanding the logic of the Court of Appeals on this subject; and this difficulty is increased by the holding of that court in *Magnus* v. *Ketcham*, 112 Federal Reporter, 752, 758, 759, that a creditor is bound by an adjudication in a bankruptcy proceeding, although he does not apear and participate therein; whereas, in the case at bar the same court holds that a creditor is not bound by an adjudication in the bankruptcy proceeding, although he does appear and participate therein, and in fact is the principal, if not the sole, actor in the matter actually litigated.

7. THE EFFECT OF THE ADJUDICATION OF THE BANKRUPTCY COURT CANNOT BE DESTROYED BY THE SUGGESTION THAT THE FINDING OF THAT COURT WAS MERELY THAT THE BANKRUPTS HAD NOT BEEN SHOWN TO BE GUILTY OF ANY OF THE ACTS OR OMISSIONS WHICH WOULD BE A BAR TO A DISCHARGE.

With respect to the express finding of the Bankruptcy Court that "the bankrupts have not been guilty of any of the acts which would be a bar to a discharge," the Court of Appeals said (Rec., 46):

> "Reading the above quoted part of the decree in the light of the prior proceedings which show that the court held as a matter of law that the specification was insufficient, and that no evidence was introduced, the meaning of the finding is 'that the bankrupts have not been shown to have been guilty of any of the acts or omissions which would be a bar to a discharge.'"

Surely the ancient maxim *"de non apparentibus et non existentibus eadem est ratio"* is a sufficient answer to this distinction. Our law knows no difference between "not guilty" and "not proven."

The District Court, when it sustained the referee's report and opinion that a false statement, to bar a discharge, must be made directly to the creditor, and that such a statement made to a mercantile agency, was not within the law, probably committed error. At any rate, later decisions take the opposite view.

In re Dresser, 146 Fed. Rep., 383.
In re Pincus, 147 Fed. Rep., 621.
In re Carton, 148 Fed. Rep., 63.
In re Kyte, 174 Fed. Rep., 867.

If the decision was erroneous, Talcott had the right to appeal therefrom. In fact, he gave notice of an appeal and had the court fix the amount of the appeal bond, but never perfected such appeal. (Rec., 30.)

The case of *Talcott* v. *Friend*, 134 Fed. Rep., 778, and 197 U. S., 620, indicates that Talcott's failure to perfect his appeal cannot be construed as an acquiescence in the decision of the District Court or as giving rise to an estoppel.

Whether based on correct or incorrect views of the law, the decree of the District Court confirming the composition and embodying the finding "that the bankrupts have not been guilty of any of the acts which would be a bar to a discharge," stands unreversed.

That the force and effect of such decree are not

qualified because of any erroneous assumptions underlying it, is a doctrine to which this court stands committed. It was said by Mr. Justice White in *Gunter* v. *Atlantic Coast Line*, 200 U. S., 273, 290:

> "The complaint in the Pegues case, it is said, mistakenly averred that the Cheraw and Darlington Railroad had not been built at the time the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the Attorney General it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. *United States* v. *California & Oregon Land Co.*, 192 U. S., 355; *Fayerweather* v. *Ritch*, 195 U. S., 276, 300, *et seq.*, and cases cited."

And by Mr. Justice Day in *Deposit Bank* v. *Frankfort*, 191 U. S., 499, 510:

> "When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or

> decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, would be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

Even if the District Court's holding in an interlocutory order, that Talcott's objection was insufficient was erroneous, that fact has no bearing upon the actual scope and effect of its final order confirming the composition and embodying an express finding that Friend, Moss & Morris had not been guilty of any of the acts which would be a bar to a discharge.

In our view, the question of *res adjudicata,* which we have discussed, is the controlling issue in this case and renders unnecessary a discussion of the other points contained in the opinion of the Court of Appeals. Inasmuch, however, as the opinion contains such points, we will make some suggestions in regard thereto.

II.

Talcott by filing his claim in the bankruptcy proceeding elected to treat it as a provable claim and waived his right to sue upon the alleged tort in connection with the creation of such claim.

1. SUCH SEEMS TO BE THE RULE OF THIS COURT, ALTHOUGH PERHAPS THE LAW IS OTHERWISE IN SOME JURISDICTIONS.

In *Adler* v. *Fenton,* 24 How., 407, an action was brought by certain creditors of Adler and Schiff against the debtors jointly with other defendants, alleging a conspiracy to dispose of their property fraudulently to the injury of creditors. Prior to beginning the suit plaintiffs had commenced an action against Adler and Schiff for the purchase price of the goods sold them. In holding that the action for conspiracy would not lie, this court said at page 411:

> "In the present suit, the plaintiffs do not allege that they were defrauded in the contract of sale of their merchandise, although there is abundant testimony to show that the purchases were made by Adler and Schiff, with the intention of defrauding their vendors. But the plaintiffs, by electing to sue for the price have waived that fraud, and confirmed the sale. Adler and Schiff were the lawful owners of the property at the time this suit was commenced."

In the subsequent case of *Lincoln* v. *Claflin,* 7 Wall., 132, an action was brought by Claflin, alleging that by means of fraudulent representations as to their financial condition, the defendants had ob-

tained large quantities of goods from him. In sustaining the right of plaintiff to recover, the court, while re-affirming the rule in *Adler* v. *Fenton, supra,* distinguished the two cases as follows (page 137):

> "The action in this case is brought to recover damages against the defendants for fraudulently obtaining the property of the plaintiffs. It differs materially from that of *Adler* v. *Fenton,* reported in 24th Howard, which is cited to show that the declaration discloses no cause of action. * * * The case at bar is not brought upon the allegation that the defendants have fraudulently disposed of their own property, but that they have fraudulently obtained possession of the property of the plaintiffs. It proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were obtained by false and fraudulent representations."

These cases have never been overruled by this court. They show that the true ground of an action to recover for damages sustained by false and fraudulent representations is not that the plaintiff has thereby been induced to enter into a valid contract transferring the title to the property, but that the plaintiff, although title has never passed from him, has lost possession through fraud.

That an action for fraudulent representations is inconsistent with an affirmance of the contract is also a necessary corollary from the opinion delivered by Mr. Justice Lurton, as a judge of the Circuit Court of Appeals for the Sixth Circuit, in *Simon* v. *Goodyear Metallic Rubber Shoe Co.,* 105 Federal Reporter, 573. True, the point actually de-

cided was narrower, namely, that a defrauded vendor who discovers the fraud while the contract is still executory and nevertheless continues to perform the contract, thereby waives all claim for the deceit. On principle, however, this involves the primary proposition. If a suit upon the contract is consistent with a claim for fraud, if an express affirmance of an executed contract does not waive the fraud, there is no reason why performance of the contract, while executory, should do so. A waiver can arise only where two positions are inconsisent.

The action for fraudulent representations cannot be maintained after an election to perform the contract because it is based, not on an affirmance of the contract, but on a disregard of it. The fraudulent purchaser is treated, for the purpose of the action, as having received the plaintiff's goods, not under authority of a valid contract, but without right. If therefore, the plaintiff concedes his right by continuing performance after knowledge of the fraud, he has condoned the fraud.

That the true ground of the liability for fraudulent representations is the obtaining of another's goods by fraud, rather than the inducing of a contract by fraud, is illustrated by the measure of damages in such cases. The damages in an action of deceit, whether brought by a vendor or purchaser, are not based on the contract price, but are limited to the plaintiff's actual loss, that is, the difference in value between the property or money which the plaintiff has lost and the property or money which he has received.

Smith v. *Bolles*, 132 U. S., 125.

Sigafus v. *Porter*, 179 U. S., 116.

As was said in *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Federal Reporter, 573, at page 579:

> "In such an action the measure of damages would not be the value of the contract if the representations which induced it had been true, but the loss which was incurred by reason of its execution. What the plaintiff might have gained would not have been recoverable, but only the loss which he sustained by its actual execution."

That an action for fraudulent representations is not consistent with an action for the purchase price, but like an action for conversion, rests upon a disaffirmance of the contract, is further made clear by the opinions of this court in *Crawford* v. *Burke*, 195 U. S., 176, and *Tindle* v. *Birkett*, 205 U. S., 183. Neither of them seems to have been considered by the Court of Appeals in the case at bar.

By deciding *Tindle* v. *Birkett*, as this court did, expressly on the sole authority of *Crawford* v. *Burke*, this court necessarily decided that the two cases were governed by the same principles.

In *Crawford* v. *Burke* a claim for conversion was held a provable claim because the plaintiff might have waived the tort and sued in assumpsit upon a contract implied by law.

As we understand its opinion, the position taken by the Court of Appeals is that the rule in regard to waiving the tort and suing upon the contract does not apply where there is actually a contract between the parties, but only where the waiver of the tort is necessary to create the fiction of a contract. We submit that this distinction is unsound; that

the rule referred to supposes that the parties have made a contract, express or implied; that one of the parties has been induced to enter into such contract by the fraud of the other; and that the party defrauded has the choice to sue upon the tort or to waive the tort and sue upon the contract. The language of this court on this subject appears to be inconsistent with the language used by the Court of Appeals in the case at bar, as appears from the following parallel quotations:

In *Tindle v. Birkett*, 205 United States, 183, this court said at page 188:

"This court held that plaintiff's claim was 'provable under the bankruptcy act,' that is, one 'susceptible of being proved,' and that it might have been proved under section 63a as 'founded upon an open account or upon a contract express or implied,' if plaintiff had chosen to waive the tort and take his place with the other creditors of the estate."

The language of the Court of Appeals is as follows (Rec., 46):

"If a claimant in bankruptcy had in truth no contract on which to base his claim; if he did not in fact sell and deliver, nor intend to sell and deliver, the goods to the bankrupt; if the bankrupt obtained possession of the goods by theft or force or trick, and if the claimant proved the theft or force or trick, to support the legal fiction of a contract,—then it might properly be ruled that the injured party should not be permitted thereafter to prove the same theft or force or trick to support an action in tort. That is, a waiver of the tort could be held to be the basis of the fiction that there

> was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with the contract's existence is necessary to the contract's enforcement."

In the case at bar Talcott exercised his right of election and filed his claim as for goods sold. He thus affirmed the contract of sale; elected to take his stand with the other creditors; and waived any right of action for the supposed fraudulent representations.

The cases cited by the Court of Appeals in support of its holding that there was no such waiver do not call for extended comment, in view of the decisions of this court cited by us.

Frey v. *Torrey*, 70 Appellate Division, 166, was expressly disapproved by this court in *Crawford* v. *Burke*. It was subsequently overruled by the New York Court of Appeals in *Tindle* v. *Birkett*, 183 New York, 267, which was affirmed by this court in *Tindle* v. *Birkett*, 205 United States, 183, *supra*.

2. EVEN IF WE SHOULD CONCEDE THE POSITION TAKEN BY THE COURT OF APPEALS, THAT THE REMEDIES BY ACTION FOR THE PURCHASE PRICE AND FOR DECEIT ARE CONSISTENT AND THAT BOTH REST ON AN AFFIRMANCE OF THE CONTRACT—WHICH CONCESSION COULD BE MADE ONLY UPON THE ASSUMPTION THAT THIS COURT ERRED IN ADLER V. FENTON, LINCOLN V. CLAFLIN AND TINDLE V. BIRKETT,—STILL THE RESULT REACHED BY THE COURT OF APPEALS WOULD NOT FOLLOW.

Talcott did more than simply elect to af-

firm the contract. By filing his claim and procuring an allowance thereof by the bankruptcy court, he in legal effect secured a judgment as for the purchase price of the goods sold.

Where a party has distinct remedies which are not inconsistent but may be pursued concurrently, a judgment in one action will operate as a merger, not only of the cause of action in that suit, but of all other concurrent causes of action.

The difference between this principle and the ordinary rule with respect to election of remedies, is that where the remedies are inconsistent, an election takes place as soon as the party has undertaken to pursue one remedy rather than the other. By so doing he waives all inconsistent remedies.

Where the remedies are not inconsistent they may be pursued concurrently. Nevertheless when the prosecution of either remedy has resulted in a judgment, all other causes of action growing out of the same matter and against the same party are merged in the judgment, because a judgment on the one cause of action covers the whole ground.

In *Barth* v. *Loeffelholtz,* 108 Wisconsin, 562, the court said on page 571:

> "The doctrine of merger applies only where the situation is the reverse of that which is ruled by the law as regards the election of remedies, though the legal effect is the same, *i. e.,* to confine the plaintiff to a single remedy. In the latter situation the remedies are always inconsistent; in the former always consistent. In the latter there can be but one remedy resorted to, though there be several at the start, because, while each of them stands for a spe-

> cific right, the several rights are alternatives. In the former, one can have but the single remedy, because, though there are several remedies standing for concurrent rights in form, the enforcement of one reasonably covering the entire field, by a rule of judicial policy, draws to it and absorbs the others, such policy being a species of equitable interference with legal remedies where they are uselessly multiplied."

Examples are not wanting of the application of these principles to the merger of a cause of action for deceit in a judgment for the purchase price.

Thus, in *Caylus* v. *The New York, Kingston & Syracuse Railroad Company*, 76 N. Y., 609, the plaintiffs had sold certain iron rails to be used in the construction of the railroad and had received in payment therefor promissory notes of the railroad company and as collateral thereto bonds which were represented to them to be first mortgage bonds of the railroad company. Plaintiffs recovered a judgment upon the notes, which was uncollectible. They thereupon began an action against the railroad company and its directors alleging that they had sold the rails and accepted the notes and bonds upon the representation that the bonds were first mortgage bonds, when, in fact, they were second mortgage bonds and so known to be by the directors. It was held that the action could not be maintained, the court saying (76 New York, 612):

> "Upon the assumption that a sufficient cause of action for a fraud committed by the directors for which the company would be liable is alleged, there could be no recovery against it for damages in this action on account of such fraud for the reason that the plaintiffs have

> already a judgment against it for the full amount due them on account of the iron sold the Litchfields. That judgment covers the entire ground and is as complete and full a remedy as any judgment for damages in this case could be. A judgment in this case against the company could not be for any more and would have no greater force. They cannot have two judgments against the company to indemnify themselves for the same loss."

Bowen v. *Mandeville,* 95 N. Y., 237, cited by the Court of Appeals, is not in conflict with the *Caylus* case. In *Bowen* v. *Mandeville,* the court, while holding the two remedies concurrent, so long as neither had been merged in a judgment covering the entire cause of action, said (95 New York, 241):

> "A different question would have been presented had the plaintiff first recovered judgment for the entire amount guaranteed to be paid by the defendant, and had then sought to maintain this action. As such a judgment would have covered the entire damage that could be occasioned by the transaction in question, it would necessarily include both the damages inflicted by the fraud as well as those resulting from the breach of contract."

In *Morgan* v. *Skidmore,* 3 Abb. N. Cas. (N. Y.), 92, after judgment had been obtained against a surviving partner for money loaned to the firm, an action was brought against the executor of a deceased copartner to recover damages for false representations made by the deceased concerning the solvency of the firm. Although the former judgment for the debt against the one partner was held to be no bar to the action for deceit against the other, the general principle applicable in cases where the parties to both actions are the same, was

conceded by the court. In this connection Mr. Justice Rapallo said (3 Abb. N. Cas. (N. Y.), 102):

> "On the argument this case was assimilated to that of a debt contracted by a party on his own individual behalf, by means of fraudulent representations made by him as to his own solvency.
>
> It is claimed that in such a case, the creditor has a right to sue in tort to recover damages for the fraud, or on contract to recover the debt; that he may pursue either of these remedies, but not both; and that a judgment in either form of action is a bar to the other; that all claims and causes of action, arising out of the transaction, are merged in such a judgment.
>
> Such would undoubtedly be the result, where various contract obligations were given by the same individual for the same debt, provided they were all his own individual and several obligations. They would necessarily all merge in the higher security of a judgment recovered on either one of them. And it may well be, that the same principle would apply in a case of fraud, where the party liable for the fraud, was the sole party responsible on the contract induced by the fraud; and that, in such a case, all liability for the fraud would be merged in a judgment on the contract.
>
> But the present case is clearly to be distinguished from one where the judgment set up as a bar is founded upon the several contract of the defendant in the action for the fraud, and is against him alone; and by considering this distinction, much confusion will be avoided."

In the case at bar there is no such distinction as is pointed out in the *Bowen* case or in the *Morgan* case. A judgment has been obtained, and both causes of action are against the same parties,

against all the members of the firm of Friend, Moss & Morris.

In Illinois the distinction which we have attempted to point out between election of remedies on the one hand and the merger by judgment of causes of action, even where they are consistent, has been noticed by Judge McAllister in the leading case of Brumbach v. Flower, 20 Ill. App., 219, in which it was said at page 222:

> *"If the action in assumpsit had gone to judgment, it would probably have been a bar to the action for the fraud. But having been discontinued, it was no waiver of the tort."*

It thus appears that even those courts which hold that an action for deceit is consistent with an action for the purchase price—contrary to the rule as announced by this court in Adler v. Fenton, and Lincoln v. Claflin, supra—nevertheless also hold that a judgment for the purchase price against the party liable for the deceit, even without satisfaction, bars any further action for the deceit.

An order of a court of bankruptcy, or of a court of probate, allowing a claim, is clearly a judgment.

> *Kuehling v. Leberman*, 2 Wkly. N. C. (Pa.), 616.
>
> *Mitchell v. Mayo*, 16 Ill., 83, 84.
>
> *Wheeler v. Dawson*, 63 Ill., 54.

The effect of the allowance of Talcott's claim in bankruptcy was therefore to merge in the order of allowance all his causes of action growing out of the sale to Friend, Moss & Morris. That the judgment of allowance may not be as valuable to the

claimant as a judgment for the deceit cannot change its legal effect as a merger of the cause of action.

In *Karr* v. *Barstow*, 24 Ill., *580, 582, it was urged that a judgment in replevin would not operate as a merger of plaintiff's cause of action for the trespass in taking the goods, because the plaintiff not being able to recover punitive damages in replevin, the judgment therein did not give him complete relief. But the court said:

> "The proposition will not bear argument. If he selected the form of action in which he was not entitled to recover vindictive damages, he must be content with the remedy which that form of action has afforded him."

Moreover, since this court has decided in *Tindle* v. *Birkett* that a claim for fraudulent representations is provable, it must follow that if such a claim is not merged in the order of allowance of a claim for the purchase price, a defrauded vendor may file two distinct claims and receive dividends upon both, provided the aggregate dividends paid do not exceed his claim.

In both voluntary and involuntary bankruptcy, it has been said, "undoubtedly the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors."

Wilson v. *City Bank*, 17 Wall., 473, 480.

The decision of the Court of Appeals tends directly to defeat both these objects. It involves as a corollary the right to file a double claim, thus preventing a just distribution. It leads to the result, in

the case at bar, of denying to petitioners the benefits of a discharge. If the Bankruptcy Act, expressly or by implication, provided that the allowance of a claim for goods sold should not affect a claim for fraud, an argument based on the general purposes of the Act would perhaps be entitled to little weight. The conclusion of the Circuit Court of Appeals, however, is not deduced from the Bankruptcy Act, but from a proposition—unsound as we contend, disputable at best—of general law that the two remedies are consistent. The soundness of a conclusion so drawn may well be deemed doubtful, when the conflict between it and the conceded purposes of bankruptcy legislation is observed.

But not only did Talcott elect a cause of action in contract and waive an action for fraud, not only did he elect a judgment allowing his claim in preference to a judgment for the fraud, but he made a further election.

By appearing in the bankruptcy proceedings and opposing petitioner's discharge, he elected in the most solemn form, to treat his debt as one not excepted from the operation of a discharge; he elected the bankruptcy court as the forum in which the effect of the alleged false statement upon his right of action should be determined.

If, as he now contends, his rights could not be affected by a discharge, if his debt was not dischargeable, what interest had he in opposing a discharge? By Section 14b of the Bankruptcy Act, the judge is directed to "hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by *parties in interest.*"

By filing objections, he declared himself to be a party in interest, and called upon the bankrupts, Friend, Moss & Morris, to litigate with him the question of their right to a discharge. If his debt was not dischargeable, if he had the same action against them whether the discharge was granted or refused, he was not a party in interest.

They accepted his declaration that he was interested, acquiesced in his claim that he was entitled to be heard, took up his challenge, employed counsel to represent them, submitted themselves to examination, and in good faith litigated in the court to which respondent had submitted the case, their right to be discharged of their liability to him.

In short, Talcott made a fourfold election. He elected his right: a claim for the purchase price in preference to an action for deceit. He elected his remedy: a judgment of allowance of his claim in preference to a judgment for fraud. He elected his defense to petitioners' application for discharge: opposition to the discharge in preference to suit after discharge. He elected his forum: the Court of Bankruptcy.

That court, having, as in duty bound, investigated the merits of the application for composition, found that the "bankrupts had not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge," and entered its decree confirming the composition.

By Section 14b of the Bankruptcy Act, as amended in 1903, it is a bar to a discharge that the bankrupt has

> "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

Our contention therefore is that the finding of the District Court that Friend, Moss & Morris had not been guilty of any of the acts which would be a bar to a discharge, was a finding that they had not been guilty of obtaining property on credit upon a materially false statement in writing. Inasmuch as Talcott's suit could be maintained only upon the hypothesis that Friend, Moss & Morris had obtained property from him on credit upon a materially false statement in writing, the finding of the District Court was fatal to his right of action.

III.

Talcott's claim was both provable and dischargeable in bankruptcy.

Under the bankruptcy law, prior to the amendment of February 5, 1903, Talcott's cause of action against Friend, Moss & Morris was a provable debt and would have been barred by a discharge.

Both of these propositions are put beyond controversy by *Crawford* v. *Burke*, 195 U. S., 176, and *Tindle* v. *Birkett*, 205 U. S., 183.

Tindle v. *Birkett*, so far as concerns the nature of the cause of action, is on all fours with the present case. If there had been no change in the law, the judgment in favor of petitioners might properly have been entered by the Circuit Court on their plea

of discharge, without reference to any other question.

In 1903 the Bankruptcy Act was amended. No amendment was made in Section 63, defining provable claims. Consequently, even if the amendment may affect the authority of *Tindle* v. *Birkett* in other respects, it is still a binding authority that Talcott's cause of action for deceit, as alleged in his declaration, was a provable claim in bankruptcy.

Nevertheless the Court of Appeals, without noticing *Crawford* v. *Burke* or *Tindle* v. *Birkett* at all, held that Talcott's claim was not a provable debt. (Rec., 47.)

The changes introduced into the law by the amendments of 1903 may seem, at first glance, to require a revision of *Tindle* v. *Birkett* as to the effect of a discharge. When the amendatory language is carefully analyzed, however, it will appear that, notwithstanding the act of 1903, all right of action, by one whose property has been obtained upon a statement in writing alleged to be false, is foreclosed by a discharge.

Section 14b was amended by adding an additional objection to the discharge of a bankrupt, viz: that he had

> "obtained property on credit from any person upon a materially false statement in writing made to such person, for the purpose of obtaining such property on credit."

No similar objection was provided for by the statute prior to the amendment of 1903.

Section 17 originally provided that a discharge in bankruptcy should release the bankrupt from all of

his provable debts, except such as * * * "(2) Are judgments in actions for frauds or obtaining property by false pretenses or false representations."

This sub-clause (2) was amended so that it now reads as follows:

> "(2) Are liabilities for obtaining property by false pretenses or false representations."

Thus there are excepted from the operation of a discharge, not merely as before 1903, judgments for obtaining property by false representations, but liabilities for obtaining property by false representations; but by the same statute it is also provided that the obtaining of property on credit upon a materially false statement in writing shall bar the granting of a discharge.

Inasmuch as obtaining property on credit upon a materially false statement in writing made for the purpose of obtaining such property on credit appears to be one mode of obtaining property by false representations, these two provisions of the Amendatory Act of 1903 are to some extent at least in conflict. If no discharge is to be granted to a bankrupt guilty of making a false statement in writing, it seems a work of supererogation to specify the effect of such discharge if granted. It becomes necessary, therefore, in order that all parts of the statute may receive a reasonable construction, to consider how these two sections may be reconciled. Only two possible constructions, it seems to us, can be suggested.

Congress either intended to grant to a defrauded creditor alternative remedies, or else Section 17 must be understood as if it read "false representations

other than the making of a false statement in writing." Under either construction, as we insist, judgment was properly entered by the Circuit Court in favor of Friend, Moss & Morris.

By alternative remedies we mean that Congress may have intended that a creditor, who had extended credit in reliance upon a false statement in writing, should have his election either (a) to object to the bankrupt's discharge; or (b) not having objected thereto, to sue for the deceit notwithstanding the discharge. This construction, while possible, implies that a discharge granted in bankruptcy is no evidence of the bankrupt's right thereto.

A further, and, from a practical point of view, more serious objection to such construction is that it would encourage creditors to whom false statements in writing had been made, to conceal the fact, refrain from opposing the discharge, and after it was granted, sue and recover judgment. In this way, the policy of Congress, evidenced by Section 14b, of making available to all creditors the objection that a false statement in writing had been made, would be frustrated. Instead of disclosing the making of the false statement and, by preventing a discharge, keeping alive the bankrupt's liabilities to all his creditors, the one to whom such statement had been made would permit the discharge to be granted and thus, by relieving the debtor of all his other obligations assure his own payment.

The other construction which to our minds at least appears more logical in theory, as well as more promotive of the purposes for which bankruptcy laws

are instituted, is that the obtaining of property on credit upon a materially false statement in writing was intended by Congress to be an absolute bar to a discharge, while the obtaining of property by false representations, *other than such a statement in writing*, was intended not to prevent the granting of a discharge, but to keep alive, after a discharge, the liability so incurred.

Such a construction imputes to Congress the same policy which has led the legislatures of some states to define as a crime the obtaining of property by false representations in writing, but to relegate to the civil courts the liability for false representations not in writing.

At the conclusion of the opinion of the Circuit Court of Appeals, it is said (Rec., 63):

> "Furthermore, if Section 14b (3) were to be interpolated into Section 17 (2)" [that is if Section 17 (2) is read as referring only to false representations other than the making of a false statement in writing] "Congress would be held to have intended the absurdity that deceivers, despite their discharges, should remain liable for oral deceits although excused from written deceits."

No doubt it would be an absurdity to conclude that Congress intended any such result; but, with all due deference to the learned court, no such conclusion follows from the construction suggested. Deceivers, despite their discharges, will remain liable for oral deceits, but they are not excused from written deceits. On the contrary, if they have been guilty of written deceits, and if the judge performs the duty imposed on him by Section 14b of the Bank-

ruptcy Act of investigating the merits of the application for discharge, their discharge will be refused altogether. Hence, the question of whether they will remain liable for written deceits despite their discharges, can only arise on the supposition that the judges of the District Courts will neglect their duties and will grant discharges when not deserved.

It seems but reasonable to hold, therefore, that Congress, by providing that the making of a false statement in writing should prevent a discharge, intended that the matter should be litigated on the application for discharge.

The statutory provisions that it should be a bar to a discharge to make a false statement in writing (Sec 14b) and that all creditors should have notice of applications for discharge or composition and an opportunity to present objections (Sec. 58) are rendered wholly useless, if creditors, although duly notified to appear, may refrain from objecting and then be in the same position as if they had successfully objected.

The argument is still stronger when, as in the case at bar, the creditor has objected and been heard on his objections. Why give him a right to object if his objections mean nothing, and if, whether he objects or does not object, and even if his objections are overruled, he still has the right to contend, despite the confirming of the composition or the granting of the discharge, that the debtor has made a false statement in writing and should not have been discharged?

When it is further considered that by the express

provisions of Section 12 the judge, before confirming a composition, is directed to satisfy himself that "the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge"; that the form of order confirming a composition prescribed by this court (Form No. 62) contains an express finding to the same effect, it seems difficult to believe that Congress or this court intended the judge to conduct such an inquiry and to embody the results thereof in his order, to no purpose whatever.

In a case recently decided by this court it was said:

> "Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based."
>
> *Blutenthal* v. *Jones*, 208 U. S., 64, 66.

Therefore, when a District Judge of the United States has, so plainly that he who runs may read, expressly found that petitioners have not been guilty of obtaining property upon a false statement in writing, his colleague sitting in the Circuit Court ought not, in a subsequent suit, to convict them of committing the very offense of which they have been acquitted by the District Court.

We have assumed that when Congress disqualified a bankrupt guilty of making a false written statement from receiving a discharge, it intended that the issue whether such statement had been made should be tried on his application for discharge.

So doing, we assume merely that Congress intended, first, that discharges should be granted to bankrupts entitled thereto and denied to bankrupts not entitled thereto; and secondly, that the court to which the bankrupt applies for a discharge should decide whether or not he is entitled to it.

If these assumptions are not valid and if Congress really intended that a creditor, to whom a false statement in writing had been made, should have the option, without any risk, either to object to a discharge, or to pay no attention to it, then it might possibly be argued that a creditor who stayed away from the bankruptcy proceedings altogether could meet a plea of discharge by showing that his suit was founded on the obtaining of property by means of a false statement. But such is not the case here.

Respondent did not stay outside the bankruptcy proceedings, but filed objections to the discharge on the very ground of the making of the same false statement which he now alleges for his cause of action. His objections were duly argued and the court found that the bankrupts had not been guilty of any of the acts which would be a bar to a discharge, *i. e.*, had not been guilty of obtaining property upon a false statement in writing.

IV

Conclusion.

We maintain therefore that the judgment of the Circuit Court against Talcott was right and that the judgment of the Court of Appeals reversing the

judgment of the Circuit Court was wrong; and we ask that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER,
Attorneys for Petitioners.

FILED.
JAN 8 1913
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 155

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,
Petitioners,

vs.

JAMES TALCOTT,
Respondent

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

HORACE KENT TENNEY,
ROGER SHERMAN,
Attorneys for Respondent.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE

Adjudication of facts, when there is.....5, 16
Bankruptcy Act, Section 14.....18, 41
Bankruptcy Act, Section 17.....20, 40, 42, 44
Confirmation, no bar to present suit.....9, 43
Discharge, effect of.....9, 27, 43-49
Election of remedies.....7, 8, 30-40
Estoppel by judgment.....4, 11-14
Estoppel by verdict.....5, 6, 14-30
Evidence, none heard on objections.....6, 19-20
Finding in order of discharge, what it means..... 21
Issues, in bankruptcy and here.....4, 5, 11-14
Merger, doctrine of, does not apply.....8, 40-42
Objections to confirmation..... 2
Objections, ruling of master on..... 2
Remedies, on obtaining goods by false pretenses..... 37
Res adjudicata, burden on one claiming it.....6, 21-22, 25
Statement of case..... 1-3
  Nature of present action..... 1, 3
  Defendant's plea 1
  Holding of Circuit Court and Court of Appeals..... 2
  What declaration contains..... 2
  Ruling of master on objections to discharge..... 2
Waiver, effect of filing claim.....7, 8, 30-40
Waiver, opinion of Court of Appeals on.....31-33

LIST OF CASES REFERRED TO.

Audubon v. Shufeldt, 181 U. S., 575 ..... 9, 46
Bacon v. Moody, 117 Ga., 207, 43 S. E., 482 7
Bissel v. Spring Valley Township, 124 U. S., 225 ..... 5, 16
Bowen v. Mandeville, 95 N. Y., 237 ..... 7, 8, 38
Burleigh v. Foreman, 12 A. B. R., 88 ..... 6, 20
Brumbach v. Flower, 20 Ill. App., 219 7
Collier on Bankruptcy (9th Edition), 262, 311, 323, 383, 1160 ..... 6, 8, 10, 19, 41, 47
Crawford v. Burke, 195 U. S., 176 ..... 8, 9, 34, 44
Cromwell v. County of Sac, 94 U. S., 351 ..... 6, 14, 22
Cyc., Vol. 3, p. 362 6
Drainage District No 1 v. Dowd, 134 Ill. App., 499 ..... 7, 37
Enfield v. Jordan, 119 U. S., 680 ..... 6, 22
Frey v. Torrey, 70 App. Div., 106; 175 N. Y., 501; 67 N. E., 1082 ..... 7, 33, 34
Harrison v. Remington Paper Co., 140 Fed. (C. C. A.), 385 ..... 5, 6, 15, 22
Hudson v. Remington Paper Co., 71 Kan., 300 ..... 6, 26
Katzenstein v. Reid, Murdoch & Co., 41 Tex. Civ. Appeals, 106; 16 A. B. R., 740 ..... 6, 7, 9, 23, 31, 44, 50
Lewensohn, In re, 99 Fed., 73, affirmed in 104 Fed. (C. C. A.), 1006 ..... 7, 9
McBean v. Fox, 1 Ill. App., 177 ..... 8, 35
Mallory v. Leach, 35 Vt., 156; 82 Am. Dec., 625 ..... 7, 8, 39
Markley v. People, 171 Ill., 260 ..... 4, 11
Maxwell v. Martin, 130 App. Div. (N. Y.), 80; 22 Am. B. R. 98 ..... 8, 34
Mussey, In re, 99 Fed., 71 ..... 4, 13, 27
Nelson v. Petterson, 131 Ill. App., 443, affirmed in 229 Ill., 240; 82 N. E., 229 9
Norton v. Huxley, 13 Gray (Mass.), 285 7
Rhutassel, In re, 96 Fed., 597 ..... 10, 47
Riverside Co. v. Townshend, 120 Ill., 9 ..... 5, 14
Russell v. Place, 94 U. S., 606 ..... 6, 21
Stitz v. Springer, 230 Ill., 276 ..... 8, 38
Servis, In re, 140 Fed., 222 ..... 6, 8, 19, 41
Sheldon v. Clews, 13 Abb. (N. C.), 41 7
Southern Co. v. St. Paul Co., 55 Fed., 690 ..... 6, 22

Southern Pac. R. R. Co. *v.* U. S., 168 U. S., 1 ..... 5, 15
Standard Sewing Machine Co. *v.* Owings, 140 N. C., 503, 53 S. E., 345 7
Standard Sewing Machine Co. *v.* Alexander, 68 S. Car., 506; 47 S. E., 711 7
Standard Sewing Machine Co. *v.* Kattell, 132 App. Div. N. Y., 539, 22 Am. B. R., 376 ..... 7, 31
Strang *v.* Bradner, 114 U. S., 555 ..... 8, 35
Stokes *v.* Mason, 10 R. I., 261 ..... 8, 35
Taylor *v.* Farmer, 81 Ky., 458 9
Thomas, In re, 92 Fed., 912 ..... 5, 10, 18, 47
Tindle *v.* Birkett, 183 N. Y., 267 ..... 8, 34
Tindle *v.* Birkett, 205 U. S., 183 ..... 8, 34, 44
Tinker *v.* Colwell, 193 U. S., 473 ..... 9, 45
Tinker, In re, 99 Fed., 79 ..... 10, 45
Turner *v.* Atwood, 124 Mass., 411 9
Union Central Life Ins. Co. *v.* Schiedler, 130 Ind., 214; 29 N. E., 1071, 15 L. R. A., 89 7
Wright *v.* Griffey, 147 Ill., 496 ..... 4, 11
Whittier *v.* Collins, 15 R. I., 90, 2 Am. St. R., 879 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 155

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

James Talcott sued Friend, Moss and Morris for deceit in obtaining property by false representations as to their financial condition. The defendants pleaded that their liability in this respect had been adjudicated adversely to Talcott in the bankruptcy proceedings of Friend, Moss and Morris, in which a composition and discharge were allowed. The issue as to former adjudication was the only issue tried by the Circuit Court in the case at bar. (Rec., 20,

25.) That court held that the bankruptcy proceedings barred Talcott from a recovery. The Circuit Court of Appeals reversed this judgment. Any detailed statement of the pleadings and proofs is unnecessary. The issue of former adjudication is clearly presented. The facts bearing on the question are not in dispute.

The declaration alleges that Friend, Moss and Morris made a false statement of their financial condition and obtained goods from Talcott on the strength of such statement. They failed to pay Talcott for the goods and went into bankruptcy. Talcott filed his claim for the purchase price of the goods sold and the claim was allowed. The bankrupts asked to have a composition with their creditors confirmed by the court. To this Talcott objected. His specification of objections recited (Rec. 28), that the bankrupt had obtained property from him and from others upon a false statement in writing made through the Woods Commercial Agency to Talcott and other creditors.

This specification of objections was passed upon by the special master to whom it had been referred, as follows (Rec., 31):

> "As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of Section 14 b (3) (of the Bankruptcy Act) would require the 'materially false statement in writing' to be made directly to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a Commercial Agency to be insufficient, and I am of the opinion that the specification should be overruled for this reason."

The special master's report was approved by the District Court (Rec., 30) and the composition confirmed. Talcott thereupon brought this suit in deceit to recover his damages as measured by the difference between the purchase price of the goods and the amount he had received in the composition. Thereupon Friend, Moss and Morris filed the plea above mentioned claiming former adjudication of the matters involved.

We are therefore to consider primarily whether the overruling of Talcott's objection to the confirmation of composition is a bar to the present suit as being *res adjudicata*. Counsel for petitioners also urge that the filing and allowance of Talcott's claim constitute an election and waiver of Talcott's claim for deceit and that the confirmation of composition discharged Talcott's claim. These questions we shall take up in the order mentioned.

BRIEF OF ARGUMENT.

I.

THE CONFIRMATION OF THE COMPOSITION IS NO BAR TO THE PRESENT SUIT.

(1) *There is no estoppel by judgment.*

(a) The two causes are not the same.

There must be identity of parties, subject-matter and cause of action.

Markley v. *People*, 171 Ill., 260 (262).
Wright v. *Griffey*, 147 Ill., 496 (498).

The proceeding in the bankruptcy court was instituted by the bankrupts for a discharge, a statutory proceeding. The proceeding in the Circuit Court was instituted by Talcott and is based on a common law right.

(b) The subject-matter of the two proceedings is different.

The subject-matter of the suit in the Bankruptcy Court was the right to a discharge. The present suit involves a tort right. The only issue tendered by the petition for discharge is the right to a discharge.

Re Mussey, 99 Fed., 71.

In the bankruptcy case the *rights of the debtors* to a discharge are involved. In the present suit, *the right of Talcott* to recover damages is involved.

(c) Identity in interest of the parties is also wanting.

In the bankruptcy court the parties were the defendants in the capacity of insolvent debtors, and the plaintiff in the capacity of a representative of all parties interested. In this case the defendants are parties in the capacity of fraud doers, and the plaintiff in the capacity of the victim of their deceit.

(2) *There is no estoppel by verdict.*

There may be estoppel by verdict where the two causes of action are different, but some specific matter is actually passed upon in the first cause and relied upon in the second.

Riverside Co. v. *Townshend*, 120 Ill., 9 (18).
Harrison v. *Remington Paper Co.*, 140 Fed., (C. C. A.), 385 (400).
Southern Pacific Railroad Co. v. *U. S.*, 168 U. S., 1.

A judgment rendered upon demurrer is sometimes conclusive of the facts confessed by the demurrer.

Bissel v. *Spring Valley Township*, 124 U. S., 225.

Talcott's cause of action was therefore established in the bankruptcy court.

The Bankruptcy Act, Section 12b, provides what must be alleged by the bankrupt in his petition for confirmation of composition. He need allege only the facts required by that section.

Re Thomas, 92 Fed., 913.

The order of discharge was a mere official form.

Official form No. 62, *Collier on Bankruptcy* (9th Edition), page 1160.

One who has a claim that is not dischargeable will not be heard to object to a discharge.

In re *Servis,* 140 Fed., 222.

The finding of the court in the order of discharge that the bankrupts had not done any act barring a discharge, not being supported by evidence, is not binding.

Burleigh v. *Foreman,* 12 Am. B. R., 88.
3 Cyc., 362 (and cases there cited).

The burden of proof is on him who claims an estoppel by verdict. The burden has not been sustained by the defendant.

Russell v. *Place,* 94 U. S., 606 (608).
Harrison v. *Remington Paper Co.,* 140 Fed. (C. C. A.), 385 (400).
Cromwell v. *County of Sac,* 94 U. S., 351.
Southern Co. v. *St. Paul Co.,* 55 Fed., 690.
Enfield v. *Jordan,* 119 U. S., 680 (691).

A misrepresentation to a third person is as effectual as a basis for an action of deceit as a direct representation to the one who is deceived.

Katzenstein v. *Reid, Murdoch & Co.,* 41 Tex. Civ. Appeals, 106; 16 A. B. R., 740.

If the record leaves it uncertain whether the judgment in the first case was based on a fact essential to plaintiff's recovery in the second case, there is no estoppel.

Hudson v. *Remington Paper Co.,* 71 Kansas, 300 (304).

II.

THE EFFECT OF FILING TALCOTT'S CLAIM.

(A) *Waiver.*

Proving a claim in the bankruptcy court or taking judgment in assumpsit does not waive the claimant's right to sue for deceit.

Katzenstein v. *Reid, Murdoch & Co.*, 41 Tex. Civ. App., 106; 16 Am. B. R., 740.

Standard Sewing Machine Co. v. *Kattel*, 132 App. Div. (N. Y.), 539; 22 Am. B. R., 376, 379 (1909).

In re Lewensohn, 99 Fed., 73, 74, affirmed in 104 Fed. (C. C. A.), 1006.

Standard Sewing Machine Co. v. *Alexander*, 68 S. Car., 506 (1904); 47 S. E., 711.

Frey v. *Torrey*, 70 App. Div. (N. Y.), 166; 175 N. Y., 501; 67 N. E., 1082.

Mallory v. *Leach*, 35 Vt., 156; 82 Am. Dec., 625.

Bowen v. *Mandeville*, 95 N. Y., 237.

Sheldon v. *Clews*, 13 Abb. (N. C.), 41.

Whittier v. *Collins*, 15 R. I., 90; 2 Am. St. R., 879.

Union Central Life Ins. Co. v. *Scheidler*, 130 Ind., 214; 29 N. E., 1071; 15 L. R. A., 89.

Standard Sewing Machine Co. v. *Owings*, 140 N. C., 503; 53 S. E., 345.

Norton v. *Huxley*, 13 Gray (Mass.), 285.

Brumbach v. *Flower*, 20 Ill. App., 219, affirmed in 131 Ill., 646.

Bacon v. *Moody*, 117 Ga., 207; 43 S. E., 482.

Drainage District No. 1 v. *Dowd*, 134 Ill. App., 499.

The same was held under the Bankruptcy Act of 1867.

Strang v. *Bradner*, 114 U. S., 555, 560.
Stokes v. *Mason*, 10 R. I., 261.
McBean v. *Fox*, 1 Ill. App., 177.

The decision in the case of *Frey* v. *Torrey*, *supra*, is not affected by subsequent decisions.

Tindle v. *Birkett*, 183 N. Y., 267.
Maxwell v. *Martin*, 130 App. Div. (N. Y.), 80; 22 Am. B. R., 93 (97).
Crawford v. *Burke*, 195 U. S., 176.
Tindle v. *Birkett*, 205 U. S., 183.

There is no inconsistency between a suit in assumpsit based on a contract, and an action for deceit for false representations in inducing the making of the contract.

Bowen v. *Mandeville*, 95 N. Y., 237.
Siltz v. *Springer*, 236 Ill., 276.
Mallory v. *Leach*, 35 Vt., 156.

(B) *Merger.*

Filing a claim in the bankruptcy court and having it allowed does not effect a merger with a claim for deceit in obtaining the property by false representations.

(See cases cited under the head of waiver above.)

Those who have claims not released by a discharge, are not "parties in interest."

Collier on Bankruptcy (9th Edition), page 262.
In re Servis, 140 Fed., 222.

III.

EFFECT OF A DISCHARGE.

This question is not before the court on the record.

The confirmation of composition did not discharge Talcott's claim for deceit.

The Bankruptcy Act expressly excepts liabilities for procuring property by false representations from the effect of a discharge.

Bankruptcy Act, Section 17a (2).

Before the amendment, the act excepted from discharges only *judgments* based on false representations.

Crawford v. *Burke*, 195 U. S., 176.

A discharge does not release *liabilities* arising out of deceit or any tort excepted by the statute.

In re Lewensohn, 99 Fed., 73.
Taylor v. *Farmer*, 81 Ky., 458.
Turner v. *Atwood*, 124 Mass., 411.
Nelson v. *Petterson*, 131 Ill. App., 443, 450, affirmed in 229 Ill., 240; 82 N. E., 229.
Katzenstein v. *Reid, Murdoch & Co., supra.*

One holding a judgment that is not dischargeable under the Act may oppose a discharge and still recover on the judgment.

Tinker v. *Colwell*, 193 U. S., 473.
Audubon v. *Shufeldt*, 181 U. S., 575.

The proper practice is to grant a discharge and try the question whether a given claim is barred by the discharge when a suit is commenced on such claim.

Collier on Bankruptcy (9th Ed.), p. 311.
In re Rhutassel, 96 Fed., 597.
In re Thomas, 92 Fed., 912.
In re Tinker, 99 Fed., 79.

Sections 14 and 17 of the Bankruptcy Act are not in conflict. Under them a creditor has two rights, first, to prevent a discharge, and, second, to recover for the fraud practiced on him.

ARGUMENT.

I.

THE CONFIRMATION OF THE COMPOSITION IS NO BAR TO THE PRESENT SUIT.

(1) *There is no estoppel by judgment.*

While an estoppel is claimed, counsel do not make it clear whether they rely on estoppel by judgment or estoppel by verdict. It seems perfectly clear there is no estoppel by judgment because:

(a) *The two causes are not the same.*

The doctrine of strict *res adjudicata* commonly designated "estoppel by judgment," to distinguish it from "estoppel by verdict," applies only where the two causes of action are identical and the subject matter of the two suits is the same. As stated by the court in *Markley* v. *People*, 171 Ill., 260, 262:

> "Where the former adjudication is relied upon as an absolute bar, there must be, as between the two actions, identity of parties, *of subject matter and cause of action.*" (The italics are ours.)

See, also,

Wright v. *Griffey*, 147 Ill., 496, 498.

In the case at bar the Circuit Court of Appeals said (Rec., 47):

> "So, also, there is lacking an identity of issues, for in the bankruptcy proceeding the only proper issue was the bankrupts' right to a dis-

charge as against all parties in interest. *In re Thomas*, 92 Fed., 912; *In re Rhutassel*, 96 Fed., 597."

The proceeding in the bankruptcy court was instituted under the statute by the bankrupts for a discharge. This proceeding in the Circuit Court—an action for deceit—is based upon the common law, not upon a statute, and seeks a recovery of damages. It cannot reasonably be contended that the proceeding in the District Court based on Specification No. 8 was an action for deceit. So the causes are not the same. That they are not the same is shown by the further fact that the cause of action given the creditors by the Bankruptcy Act must have been litigated in the United States District Court. The cause of action relied upon in this case (as the law stood prior to January 1, 1912), could not be litigated in that court at all, but must have been litigated either in one of the United States Circuit Courts or in some state court.

(b) *The subject matter of the two proceedings is different.*

In the bankruptcy court the subject matter was the discharge and it involved only *contract* relations between the parties. The object of the petition for confirmation was to affect the contract relations between the bankrupts and their creditors. Specification No. 8 in opposition to their petition was interposed to prevent this contract relation being affected. In this case it is not sought to interfere with any contractual rights, but it is sought to enforce a *tort* right,—to recover from the defendants on a

liability in tort for a deceit practiced by them upon Talcott. In one proceeding the subject matter was contractual rights, in the other the subject matter is tort rights.

The issue in the bankruptcy court was simply this: Assuming that debtors made a false financial statement to a commercial agency which in turn was submitted to Talcott, and Talcott sold goods on the strength of it, should the debtors be denied a discharge in bankruptcy?

> "The only issue tendered by the petition for a discharge is the right to a discharge and that the only facts properly pleadable in opposition thereto are those which show that the bankrupt is entitled to no discharge whatsoever." (Citing *Re Rhutassel*, 96 Fed., 597.)
>
> *Re Mussey*, 99 Fed., 71, at p. 72.

In the case at bar the issue is whether or not the debtors are liable to Talcott for obtaining goods by false representations. In the first, *the rights of the debtors* to a discharge are involved. In the second, *the right of Talcott* to recover damages is involved.

(c) *Identity in interest of the parties is also wanting.*

The Circuit Court of Appeals in the opinion said (Rec., 47):

> "In the bankruptcy court the parties were the defendants in the capacity of insolvent debtors and the plaintiff in the capacity of a representative of all parties interested in opposing the discharge, while in this action the parties are the defendants in the capacity of *frauddoers* (separate and distinct from their

> character of *contractors*, as hereinabove pointed out), and the plaintiff in the capacity of the solitary victim of their deceit." (The italics are ours.)

It therefore appears that, aside from identity of parties, identity of *causes of action* and *subject matter* does not exist. Hence the doctrine of estoppel by judgment has no application. It follows that the defendants are relegated to the subdivision of *res adjudicata* known as estoppel by verdict. That doctrine *may* be applicable where the causes of action and subject matter are different, but, as we shall presently show, it is not applicable in this case.

(2) *There is No Estoppel by Verdict.*

When the two causes of action are different, the only adjudication that can possibly be available is an adjudication of a *specific matter actually passed upon in the first cause* and relied upon in the second. This is clearly pointed out in *Riverside Co.* v. *Townshend*, 120 Ill., 9, at p. 18, where the court quotes at length from *Cromwell* v. *County of Sac*, 94 U. S., 351, saying:

> "There is a well-founded distinction, laid down in the books between 'the effect of a judgment, as a bar or estoppel against the prosecution of a second action upon the same claim or cause of action, and its effect, as an estoppel, in another suit, between the same parties, upon a *different claim or cause of action.* In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action * * * concluding parties, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter

which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel *only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, *the inquiry must always be as to the point or question actually litigated and determined in the original action*, not what might have been thus litigated and determined.'" (The italics are ours.)

In *Harrison* v. *Remington Paper Co.*, 140 Fed. (C. C. A.), 385, 400, the court said:

"When the second suit is upon a *different cause of action*, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was *actually litigated and determined* in the first action, but it is not conclusive relative to other matters which might have been, but were not, litigated or decided." (The italics are ours.)

Where an estoppel by verdict is claimed it must be shown that some right, question or fact was distinctly put in issue and directly determined by the court in the first case. (*Southern Pacific Railroad Co.* v. *U. S.*, 168 U. S., 1.)

What is the fact, right or question put in issue in the bankruptcy proceedings which is essential for the present recovery? Counsel for petitioners do not tell us. Assuming that *facts* are adjudicated when a case is disposed of on demurrer (a proposition which counsel argue at

great length (Brief of Petitioners, 26 *et seq.*)), the facts as stated in Talcott's objections are established. These facts are (Rec., 28) that the debtors secured goods from Talcott and others by means of false statements of financial condition. The adjudication of the facts then is consistent with, and in fact conclusive of, Talcott's right to recover in the present action. The cases cited by counsel for petitioners holding that where a case is disposed of on demurrer the facts alleged are *res adjudicata* so far as any other suit between the same parties is concerned, is typified in *Bissel* v. *Spring Valley Township*, 124 U. S., 225 (cited by counsel for petitioners, p. 26 of their brief). It is there stated (p. 233):

> "'A judgment rendered upon demurrer is equally conclusive (by way of *estoppel*) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well in the former case as in the latter, by way of *record*. And facts, thus established, can never afterwards be contested, between the same parties or those in privity with them.'"

If the facts are adjudicated as to one party of course they are as to the other. It would therefore appear, applying this rule to the case at bar, that the facts alleged in Talcott's objections are adjudicated; that is, that the debtors made false representations of their financial condition; that Talcott relied on such representations and sold them goods on the strength thereof. These facts of course are consistent with and conclusive of Talcott's right to recover in the present action. We may therefore admit that counsel's contention in respect to the ad-

judication of the facts upon the sustaining of a demurrer, and still it does not appear that Talcott is barred by reason thereof from maintaining this case.

It may be, however, that counsel mean to contend that since a demurrer to Talcott's objections was sustained, the court in substance held that the allegations in Talcott's objections were not true. Of course there is no authority or reason for such a proposition. The cases cited in counsel's brief indicate the contrary, *i. e.*, that when a demurrer is sustained the facts *as alleged* in the pleading demurred to are *res adjudicata*. Of course there would be no justification for any contrary view.

Perhaps what counsel means to argue is that, since in effect a demurrer was interposed to Talcott's objections (Petitioner's Brief, 26, 27), and the demurrer sustained, the facts in the bankrupts' petition for discharge are established for all time, *i. e.*, that the bankrupts were not guilty of any act preventing a discharge. Of course if any facts are adjudicated in sustaining a demurrer it is only the facts alleged in the pleading demurred to. In this case that would be Talcott's objections. Furthermore there is no allegation in the bankrupts' petition for discharge that they were not guilty of any act preventing a discharge.

Counsel also contend that the finding of the court in the order of discharge to the effect that the bankrupts had not been guilty of any act preventing a discharge is an adjudication against our present claim.

The Bankruptcy Act, Section 12b, provides that a bankrupt may procure a confirmation of composi-

tion by showing in his petition therefor that his offer of composition has been accepted by a majority in number and amount of his creditors; that he has properly deposited the consideration therefor, and sufficient money to pay the priority creditors and court costs. In the case at bar the bankrupts complied with this requirement in the District Court. Their petition for a confirmation of the composition set out the above facts (Rec., 26); it did *not* allege that the bankrupts had not been guilty of any of the acts which would deprive them of a discharge (confirmation of composition) and this is not required by statute. (Section 12b.) Upon alleging in the petition for confirmation the facts required by statute, a confirmation of composition will follow, *as a matter of course, unless it is shown by a party interested that the petitioner has done one or more of the six acts mentioned in the statute* (Section 14b).

It is sufficient if he alleges the facts in Section 12b as stated by the court in *Re Thomas,* 92 Fed., 912 (cited by the Circuit Court of Appeals in its opinion, Rec., 47):

> "Section 14, paragraph b, makes it the *duty* of the judge to grant the discharge, provided the requisites as to notice, etc., have been observed, *unless* one of the two grounds in said paragraph stated is proven. (The law provided for only two grounds of opposition until 1903 when by amendment they were increased to six.) The duty of proving that such ground exists is on the opposing creditor. Where the grounds are duly specified, and, if proven, would prevent discharge, the judge will fix time and place of hearing. But the judge neither seeks to discover grounds, nor supplies lack of specification. '*He shall discharge unless,* etc.'" (The italics are ours.)

From this it appears how utterly without foundation or justification is the finding of the District Court (Rec., 30) that the bankrupts were not guilty of any act that would bar a discharge. The only objector offering proof on the subject was Talcott. His evidence was barred out. The fact is the court was merely following a printed form applicable in cases where there is some evidence on the subject of the bankrupt's conduct. (See Official Forms No. 62, Collier on Bankruptcy, 9th Ed., p. 1160.)

The Circuit Court finds (Rec., 21) that no evidence was heard by the special master in support of specification No. 8. That none was heard is further shown by the fact that Talcott objected to the approval of the special master's report in favor of a confirmation of composition because he had not been allowed to offer evidence before the special master to prove that the bankrupts had made the alleged statement, that it was materially false, etc. (Rec., 29.)

The master regarded Talcott's specifications of objections as no objections at all; overruled them (Rec., 31) and then declined to hear evidence as to whether or not Talcott had been deceived. As a matter of fact so far as the deceit was concerned Talcott had no right to object to the discharge because his claim was not dischargeable. (*In re Servis*, 140 Fed., 222.) When the matter came on for hearing the court found that the bankrupts had not done any act that would bar a discharge, since there was no evidence of what they had done in the way of deceiving Talcott (none being permitted), nor in fact any evidence on the subject of the debtors' misconduct. The court necessarily. therefore, found nothing in the rec-

d to prevent a discharge. Of course a finding is good just so far as the evidence sustains it. Here there was no evidence of misconduct and no evidence that the bankrupts' had not done any act barring a discharge. The record was silent because the master had ruled out all evidence of misconduct. The finding, therefore, has nothing whatever behind it, and the effect of the order of discharge would be exactly the same as if there was no finding at all on the subject of whether or not the bankrupts had done anything that would bar a discharge. The court was in no position to say that Talcott and other creditors had not been deceived; there was no evidence before the court on that subject. To say that the court passed upon this subject for all time in the absence of any evidence on the subject is equivalent to saying that a court can make a finding not in the remotest way connected with the case or the evidence in the record, and thereby bind all parties for all time. The authorities hold that a finding of fact not supported by evidence is not binding on a court of appeal. *Burleigh* v. *Foreman,* 12 Am. B. R., 88.

If a finding is unsupported by evidence, or if a fact material to a finding upon which the judgment is based is unsupported by evidence, the judgment will be reversed. 3 Cyc, 362 (and cases there cited).

Yet we find counsel relying upon this recital in the order of discharge as conclusive of the case at bar. As to the part of the order reciting (Rec., 30) "that the bankrupt has not been guilty of any of the acts * * * which would be a bar to a dis-

charge," the Circuit Court of Appeals says (Rec., 46):

> "Reading the above quoted part of the decree in the light of the prior proceedings which show that the court held, as a matter of law, that the specification was insufficient, and that no evidence was introduced, the meaning of the finding is 'that the bankrupts have not been shown to have been guilty of any of the acts or omissions which would be a bar to a discharge.' In the absence of such a showing, it was the duty of the court, under section 14b, to grant the discharge (confirm the composition)."

Assuming, however, that the finding of the District Court that the bankrupts had not been guilty of any act that would bar a discharge is to be given full face value, let us see what that value is.

The burden of proof is on him who claims an estoppel by verdict.

In *Russell* v. *Place*, 94 U. S., 606, 608, the court said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject matter of the action will be at large, and open to a new contention, unless

> this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

In *Harrison* v. *Remington Paper Co.*, 140 Fed. (C. C. A.), 385, 400, the court said:

> "Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action, which *may not have been raised, litigated, and decided in the former action,* the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action." (The italics are ours.)

To the same effect are *Cromwell* v. *County of Sac,* 94 U. S., 351; *Southern Co.* v. *St. Paul Co.*, 55 Fed., 690; *Enfield* v. *Jordan,* 119 U. S., 680, at 691.

So, even if evidence had been offered on Talcott's Specification No. 8, or on an allegation in the bankrupts' petition for confirmation, and the court had found as it did "that the bankrupts had not been guilty of any of the acts * * * which would have been a bar to the discharge," it still would be a part of defendants' case in this court to show affirmatively by the record or by extrinsic evidence that the very facts relied on in this case as a basis for deceit were found against Talcott. This, of course, has not been and cannot be done.

The District Court might have found from the evidence (if evidence had been introduced) that the statement was not in writing (merely because partly oral and partly printed) and for that

reason have confirmed the composition. The statute says the statement must be in writing; if not, even though false, and even though all the facts constituting a cause of action in deceit existed, the finding would be that the bankrupts were not guilty of any of the acts which would bar a discharge—a finding not inconsistent with Talcott's present contention. Then again, if the facts had been gone into, the court might have found that the statement was made to Woods' Commercial Agency and that the making of a statement to the Agency was insufficient under the Bankruptcy Act to justify the court in refusing to confirm a composition. If those were the facts upon which the court made the above finding in its decree Talcott may still recover in this action of deceit.

A finding that the statement was made to Woods Commercial Agency would not necessarily control the rights of Talcott in this case. The statement may have been made to Woods Agency and thus be insufficient to constitute a basis for denying confirmation, but yet be entirely sufficient to constitute a basis for this action of deceit. A misrepresentation to a third person intending to deceive another is as effectual to give rise to an action in deceit as a direct representation to him. In *Katzenstein* v. *Reid, Murdoch & Co.*, 41 Tex. Civ. App., 106, 16 A. B. R., 740, the representation was made to a commercial agency and the plaintiff relied upon it. The court permitted a recovery in an action of deceit.

The action in the District Court involved six different questions:

(1) Did the bankrupts make a statement?

(2) Was it materially false?

(3) Was it in writing?

(4) Was it made for the purpose of procuring property on credit from Talcott?

(5) Did they procure property *on credit* from Talcott by means of the statement?

(6) Was the statement made to Talcott?

The finding that they were not guilty of any of the acts which would deprive them of a discharge did not necessarily settle any specific one of these six questions. *If any one of these questions were answered in the negative by the District Court, then the bankrupts would be entitled to their discharge.* Who shall say which way any one of these questions was answered when the District Court merely found that the bankrupts had not been guilty of any of the acts that would bar a discharge?

We know that the master found the objections insufficient since they alleged that the statement was made to a commercial agency. Since the decree of discharge was based on this fact alone there is no adjudication that effects the present case. In this suit it is immaterial whether the statement was made to a commercial agency or to the plaintiff direct.

The substantial issues of the present case as stated in the second additional count of the declaration (Rec., 10) are:

(1) Did the defendants make representations?

(2) Was it false?

(3) Was it made with knowledge of its falsity?

(4) Did they procure property from Talcott by means of these representations?

In this connection it is of importance to note that the action for deceit is pleaded in four counts, three of which are based upon an alleged written statement, but the other, (called "Talcott's second additional count"), does not mention any written statement to Woods Commercial Agency or to any one else, but is based on a false financial statement and representation (not alleged to be in writing) made direct to Talcott. (Rec., 10.)

The only questions common to both cases are those designated in each instance as the first and second.

In order for the defendants to interpose successfully the plea of *res adjudicata* it is incumbent on them to prove that in the former case one of the four questions last above stated was determined in the negative. If it appears in this case that the bankruptcy court may have found any one of the third, fourth, fifth or sixth of the points first above mentioned in the negative or *if the defendants fail to prove that the bankruptcy court based its decree on either the first or second* points first above mentioned, *there is no estoppel in this case.* In other words, if the record leaves it uncertain whether the judgment in the bankruptcy court was based on a fact essential to plaintiff's recovery here or on a fact immaterial here but material in the bankruptcy proceeding, then there is no estoppel because the burden is on the party asserting the estoppel to prove that the essential fact

was litigated in the first proceeding. It does appear that the bankruptcy court may have based its ruling on any one of the six points first above mentioned. There is no showing and there can be none that the District Court found any of the points essential to this cause of action adversely to Talcott's contention. We know on the contrary, from the master's finding that the specification of objections was held insufficient because it did not state that the false statement was made to Talcott. Hence there was no adjudication of any fact essential to recovery in the case at bar.

(We have here followed the pattern set by the Supreme Court of Kansas in *Hudson* v. *Remington Paper Co.*, 71 Kansas, 300, 304.)

Interpreting literally the finding in the order that the bankrupt has not been guilty of any of the acts that would prevent a discharge, without regard to the evidence which it is based, would have two serious results:

(1) It would read out of the exceptions provided by Section 17 of the bankruptcy act all claims based on facts which would prevent a discharge under Section 14. This of itself would be a serious result and one plainly not contemplated by the framers of the act.

(2) It would prevent anyone from coming in under Section 15 of the act and setting aside the discharge. Or to state it, conversely, since Section 17 (2) exempts from a discharge, among other things, liabilities for obtaining property by false representations, it seems clear that it was not intended that a dis-

charge should be an adjudication that the debtor had not so obtained goods. And since Section 15 provides for opening up a discharge if fraud is shown, it is clear that a discharge was not intended as an adjudication that there had been no fraud.

Counsel claim that Talcott has had his day in court on the issue as to whether or not his claim should be barred by the discharge in bankruptcy. (Petitioner's Brief, 13.) In this we submit counsel is mistaken. On the trial of the case at bar that issue was first raised. It is that question that we are now arguing. It was not raised or suggested in the bankruptcy court. There the issue was not what should be done with Talcott's claim for deceit. Such a claim as a basis for damages had not then been thought of. The question in that court was what should be done with the bankrupts,—should they be discharged or not? This was the only issue. (*In re Mussey*, 99 Fed., 71.) In entering the order of discharge the court said: "Yes, discharge them. There is no evidence here that they have done anything to prevent a discharge." But discharged from what? Section 17 says from their provable debts except * * * liabilities for obtaining property by false * * * representations. So the discharge was granted but whether it discharged Talcott's claim was left at large by the court, though settled conclusively by the statute.

It will be observed that the provisions of the Bankruptcy Act to the effect that the bankrupt shall not be relieved from liability for obtaining money by false pretenses is much broader than the provision of the Act preventing the bankrupt from being discharged

on the ground that he has obtained property on credit upon a materially false statement in writing. The latter provision is to the effect that he is not entitled to a discharge "if he has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." The former provision is to the effect that he will not by his discharge be relieved of "liabilities for obtaining property by false pretenses or false representations."

Many acts on the part of the bankrupt could be enumerated which would make him liable for obtaining goods by false pretenses, but would not prevent his discharge in bankruptcy.

For instance, to bar a discharge it must be shown that property was obtained on credit upon a materially false statement in writing made by the bankrupt. To sustain an action for obtaining property by false representations it need not be shown that a statement was made in writing, nor that any statement at all was made. Any false representations, whether in writing or not, or even a course of conduct on defendants' part misleading and intended to mislead plaintiff, would be actionable if they resulted in the plaintiff's parting with his property. Goods obtained by any trick or device, or by a confidence game are none the less obtained by false pretenses; but the bankrupt could not be prevented from being discharged on that account, guilty though he might be. Furthermore, if the bankrupt obtained goods on a bogus check or a forged note, while an action for obtaining goods by false pretenses would

lie, he could still get his discharge because he would not be obtaining the goods *on credit*. Other points of dissimilarity in the two sections could readily be pointed out.

It might well be, therefore, that the bankrupt would be entitled to a discharge because he had not violated the exact provisions first above quoted, but at the same time would still be liable in an action similar to the suit at bar for obtaining property by false pretenses. In other words, the finding that a bankrupt is entitled to a discharge is far from finding that he has not obtained goods by false pretenses.

From this it follows that the finding of the court that the bankrupts had not been guilty of any of the acts that would bar a discharge (even if based on evidence) would not necessarily bar an action based on false pretenses.

The gist of this phase of the case is this: Talcott claims that he was deceived by Friend, Moss and Morris and damaged thereby. On the face of things it would appear that he has a right to have a court pass upon this question. If this question has already been tried, of course, he has no right to a second trial on it. If it has not been tried, it should be unless good reason to the contrary is shown. The question of deceit has never been before any court in any proceeding. Counsel for petitioners do not even pretend that this question has been tried, but merely that "Talcott has had his day in court on the issue as to whether or not his claim is barred by the discharge in bankruptcy." (Brief of Petitioners, page 7.)

Their position therefore is that even admitting that Talcott was grossly cheated and defrauded, through the hocus-pocus of the bankruptcy proceedings, he has been done out of his real substantial right to have his loss made good. In other words, this court is asked to find that by reason of having filed his claim and his objections in the bankruptcy proceedings (which objections the bankruptcy court held were insufficient in law to prevent a discharge) Talcott is precluded from recovery in any court for the deceit practiced upon him. To state it a little differently, by legal legerdemain (assuming counsel's contention is true), a man may be deprived of a substantial right without having a hearing in court on the real issues involved.

II.

THE EFFECT OF FILING TALCOTT'S CLAIM.

A. *Waiver.*

It is now claimed that by filing his claim in the bankruptcy court and having it allowed, Talcott waived his right to sue for deceit. This defence has never been pleaded, was not passed upon in the trial court and was never mentioned in the case until the oral argument in the Circuit Court of Appeals was made. The only issue tried was that of former adjudication. (Petitioners' Br., 3.) The question of waiver is therefore not before the court on the record. However the Circuit Court of Appeals discussed it and we will therefore answer the contention now made regarding it.

The exact question here discussed has many times been decided. Proving a claim in the bankruptcy court or taking judgment in assumpsit does not waive the claimant's right to sue for deceit.

See many cases cited in our brief, *supra.*

In *Standard Sewing Machine Co.* v. *Kattell,* 132 App. Div. (N. Y.), 539, in an able opinion, it was expressly held:

> (1) A discharge in bankruptcy does not discharge a claim for deceit.
>
> (2) Proving a claim in bankruptcy proceedings and receiving dividends on it does not waive the right to recover for deceit.
>
> (3) Filing objections to a discharge on the same grounds as those on which the deceit is based does not preclude a recovery for the deceit.

In *Katzenstein* v. *Reid, Murdoch & Co.,* 41 Tex. Civ. App., 106, it is held that filing a claim in bankruptcy and receiving dividends in it does not waive the right to recover in deceit.

The Court of Appeals in its opinion admirably stated the law on the subject as well as the reason behind the law. We quote from their opinion. They say (Rec., 45):

> "Filing the claim was an affirmance of the contract of sale, and constituted an election not to rescind and attempt to recover what plaintiff had delivered to defendants in pursuance of the contract. But an action for deceit is not based on rescission. It too, implies an affirmance. It means that plaintiff has elected to abide by the contract, to retain and make the best of what he received thereunder, and to recover the difference between what he received and what he parted with, as his damages in being misled.

In *Cheney* v. *Dickinson*, 172 Fed., 109, 96 C. C. A., 314, we pointed out that an action for deceit can be maintained against any one who intentionally deceived the plaintiff into making and carrying out the contract. Against any one—quite irrespective of whether the deceiver was himself a party to the contract or not. 'In such an action it is immaterial whether the defendant did or did not receive the consideration or other benefit, because the gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction.' So there was no inconsistency in plaintiff's realizing all he could from defendants' explicit promise to pay, and afterwards demanding damages for having been deceived into accepting such a poor obligation in exchange for his goods, because the defendants, were sued in two separate and distinct capacities. That the promisors in the contract case and the fraud doers in the deceit case were the same persons was an incident immaterial to either case.

In *Frey* v. *Torrey*, 70 App. Div., 166, 75 N. Y. Supp., 40, 8 Am. Bankr. Rep., 196, affirmed by the Court of Appeals in 175 N. Y., 501, 67 N. E., 1082, which was an action by respondent, plaintiff below, to recover damages suffered through appellant's deceit in inducing respondent to deposit money with appellant while insolvent, the court said:

'The appellant's contention that the respondent is estopped from prosecuting this action by his election to prove his claim in bankruptcy remains to be considered. * * * We fail to discover any inconsistency between the remedy pursued by the respondent in the bankruptcy court and that adopted by bringing this action. It does not necessarily appear that the respondent waived the tort by filing proof of his claim in bankruptcy. If not, merely proving the indebtedness which concededly existed and which was

induced by fraud would not be inconsistent with subsequently bringing an action to recover the money obtained by fraud.'

If a claimant in bankruptcy had in truth no contract on which to base his claim; if he did not in fact sell and deliver, nor intend to sell and deliver, the goods to the bankrupt; if the bankrupt obtained possession of the goods by theft or force or trick; and if the claimant proved the theft or force or trick to support the legal fiction of a contract—then it might properly be ruled that the injured party should not be permitted thereafter to prove the same theft or force or trick to support an action in tort. That is, a waiver of the tort would be held to be the basis of the fiction that there was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with the contract's existence is necessary to the contract's enforcement.

We conclude, therefore, that the prosecution of the claim in bankruptcy was not a bar to this action for deceit."

In *Frey* v. *Torrey*, 70 App. Div. (N. Y.), 166 (171), cited by the Court of Appeals, the court said in addition to the above quotation:

"There would seem to be no reason in holding that the proof of a claim in bankruptcy is an election which debars the creditor from afterwards pursuing the debtor for the same claim unless it be one dischargeable in bankruptcy. The claim being provable in bankruptcy, there is no inconsistency in permitting the creditor to prove it and share in the distribution and subsequently adopt other remedies for collecting the balance of the claim."

This case was subsequently reviewed by the New York Court of Appeals in 175 N. Y., 501, in which the following question was certified to that court for decision:

> "Has a creditor of a bankrupt, who has proved his claim against the bankrupt in proceedings in bankruptcy * * * as a debt due him from the bankrupt, made such an election of remedies as will preclude him, after the bankrupt's discharge, from maintaining an action upon the same debt, which has not been paid, where he alleges and proves in order to overcome the defense of a discharge in bankruptcy, that such debt was created by the fraud of the bankrupt?"

This question was answered in the negative.

As stated by petitioners' counsel, the New York Court of Appeals expressly overruled *Frey* v. *Torrey, supra,* in *Tindle* v. *Birkett,* 183 N. Y., 267; 76 N. E., 25. They failed to state, however, that it overruled the case on only one of the two points decided. The point relied on by respondent as to *waiver* was not overruled, and that decision is still the law of New York on that point, as recognized by *Maxwell* v. *Martin,* 130 App. Div. (N. Y.), 80, 22 Am. B. R., 93, at 97, where the court said:

> "As we understand the case of *Frey* v. *Torrey* (175 N. Y., 501), it is *still authority* for the proposition that a creditor of a bankrupt does not waive his right of action to recover damages for false pretenses or representations by proving his claim in the bankruptcy court."

Counsel also say that *Frey* v. *Torrey, supra,* "was expressly disapproved by this court in *Crawford* v. *Burke,*" 195 U. S., 176. A reading of the latter case will readily show that the point in question, *i. e.,* waiver, was not even remotely touched upon by this court. Neither was it considered in *Tindle* v. *Birkett,* 183 N. Y., 267, nor in the same

case in 205 U. S., 183. Yet counsel would have us believe that under the decisions of this court and of New York the case of *Frey* v. *Torrey* is not the law on the subject of waiver. As a matter of fact there is nothing in any of the cases mentioned conflicting in the least with the clearly expressed holding of *Frey* v. *Torrey* and *Maxwell* v. *Martin*, 130 App. Div. (N. Y.), 80, that proving a claim in the bankruptcy court does not waive the right to recover for deceit.

In *Strang* v. *Bradner*, 114 U. S., 555 (560), it is held that even though a party specifically waives his right to damages for deceit, and makes a claim against the estate of the bankrupt on another theory of liability, the discharge in bankruptcy is no defense and an action for deceit can be maintained.

The case of *Stokes* v. *Mason*, 10 R. I., 261, arose under the Bankruptcy Act of 1867. The court there permitted the creditor to hold the debtor under circumstances very similar to those in this case in an action for fraud, saying (p. 263):

> "If, by proving such a debt, the creditor waives and surrenders all claims except under the bankrupt law, then why provide that a discharge should not affect it? And construing the sections together, it seems the intention that the claimant may present a claim arising from fraud and receive his dividend, but shall not prosecute it until the question of discharge is determined; but that thereafter, whether the petition is discharged or not, it shall remain a valid claim against him, recoverable in any proper form of suit."

McBean v. *Fox*, 1 Ill. App., 177, was an action for deceit based on false statements by means of

which plaintiff was induced to buy a promissory note. The note was executed by Fox & Howard and endorsed by Atkins and Burgess. Fox & Howard and Atkins & Burgess had both been adjudicated bankrupts under the Bankrutcy Act of 1867, and the plaintiff had proved up the note against both and received a dividend for a portion of the face of the note. In rendering its opinion the Appellate Court said (p. 187):

> "The evidence shows that appellant proved up his note in the court of bankruptcy, against the estates of Fox & Howard, and of Atkins & Burgess, and received, upon distribution of the assets of those estates, a dividend amounting to $630.
>
> It is insisted, on behalf of appellees, that appellant, having elected to treat his note as a valid contract between him and appellees, and having proceeded in the manner and to the extent above indicated, to enforce the same against their estates, is now precluded from the recovery of damages for the alleged frand and deceit in the negotiation of the note.
>
> In this we think they are in error.
>
> Had appellant, on discovering the fraud, desired to sue for and recover back the original consideration paid by him, he would unquestionably have been compelled to rescind and repudiate the contract before he could be permitted to maintain such suit. This case stands upon entirely different principles.
>
> In order to recover for the deceit, he is not obliged to restore the property purchased, but may retain and avail himself of such property, to the extent of its value, and his doing so can only be considered upon the question of damages, in his action for the tort."

There is nothing in the cases cited by counsel for petitioners on this point in conflict with the rule

above stated. All the cases on the subject cited by either side or by the court can be reconciled on the following theory:

When B through false representations induces A to part with property, A has presented to him the following possible courses:

(1) He may sue in assumpsit on the contract of sale.

(2) He may sue for the deceit.

(3) He may replevin the goods on the theory that by reason of the deceit no title passed.

(4) He may sue on the legal fiction of a contract (if, in fact, he neither sold nor intended to sell but lost possession of the goods through the trick practiced on him).

Of these we are concerned primarily with (1) and (2). These are quite consistent as both rest on the affirmance of the contract. Both are based on the theory that title passed. (1) and (3) are of course inconsistent. (2) and (4) may be inconsistent, as pointed out by the Circuit Court of Appeals, since the gist of the action in both is the deceit and the evidence of deceit supports both actions.

In *Drainage Dist. No. One* v. *Dowd*, 132 Ill. App., 499, the court said (p. 503):

> "Election of remedies is choosing between different modes of procedure and relief allowed by law on the same state of facts. To bind a party by an election he must have begun a form of action under which he could have obtained some relief if it had proceeded to an adjudication between the parties, *and which action gives a certain character to facts which another*

form of action would change." (The italics are ours.)

The proof of the claim in the bankruptcy court gave no character to the facts which the action for deceit would change. The first says: "He owes me so much for the goods he deceived me into selling him." The second says: "He damaged me by deceiving me into selling him goods."

In *Bowen* v. *Mandeville,* 95 New York, 237, plaintiff sued to recover damages for an alleged fraud by which Bowen, plaintiff's testator, was induced to purchase the bond and mortgage of the defendant. It appeared that Bowen had previously recovered two judgments against defendant for installments of interest falling due on the bond in an action upon a guaranty of payment contained in the assignments of the securities. The court stated that a rescission of the contract and recovery of the property would be inconsistent with an action for fraud for damages. Then it held that an action for fraud was consistent with an action on the contract of guaranty in which the contract of sale was affirmed, since both proceeded upon the theory of an affirmance of the contract, saying on pp. 241, 242:

> "The several causes of action stated by the plaintiff are consistent, and co-exist independent of each other, and upon settled principles are each maintainable until satisfaction of the whole damage is finally obtained either in one form or another. (*Allaire* v. *Whitney,* 1 Hill., 484.)"

In *Siltz* v. *Springer,* 236 Ill., 276, it was held that the purchaser of notes may recover for the deceit in

inducing the purchase without surrendering the notes.

In *Mallory* v. *Leach*, 35 Vt., 156, the defendant made false representations to the plaintiff as to the value of certain stock he bought from her. She afterwards sought to hold him liable in an action on the case for deceit, although retaining the money received from him for the stock. He contended that plaintiff, after discovery of the fraud, should have returned the money and rescinded the contract, and having failed to do this she affirmed the contract and waived the fraud. The court said, p. 157:

> "As to plaintiff, as fraud avoided the contract, she had the right, if she saw fit, on discovery of the fraud, to treat the contract as wholly at an end,—to return defendant his note, and demand a reconveyance of the stock. This would have been to rescind or *disaffirm the* contract. If she thought that the stock would continue to advance in value and remain a highly profitable investment, she might have deemed it for her interest to have back the stock; and in order to accomplish this, she should have given notice immediately to the defendant, the she disaffirmed the contract and demanded back stock. *But she was not bound to do this.* She might claim what was due her by contract, and also rely upon her right to recover her damages, for the amount of which she had been defrauded,—which would be the difference between what the defendant had agreed to pay her for the stock and its true value. In such case, she would have ratified the contract, but would not thereby have waived her claim to damages.
>
> The fallacy of the defendant's claim is this: that it *supposes a ratification of the contract to be a waiver of the right to recover damages.* Not at all. The plaintiff has the right to hold

> the defendant to his contract, and also to recover of him compensation for the injury occasioned by his fraud. How can the defendant complain of this? It is but making the plaintiff good. It cannot injure the defendant, or deprive him of any defense, or impair any right." (The italics are ours.)

Only in the event that the vendor or vendee rescinds the sale or does acts which indicate an election to rescind, will he be deprived of the right to sue for damages arising out of deceit and fraud. An affirmance of the contract and an action to rescind are inconsistent; but an affirmance of the contract and an action in deceit *are not inconsistent.*

B. *Merger.*

Counsel first argue that the two remedies are inconsistent. They then argue that they are consistent but are merged one in the other when a judgment is obtained. They admit that there is no merger unless the causes are consistent. Their contention in this respect is answered by the cases cited in our brief under the head of "Waiver." In this connection it is quite significant that Section 17 (2) excepts liabilities *for obtaining property* by false representations. Congress must be presumed to have known that wherever property is obtained by false pretenses, the person defrauded has a right to recover in assumpsit for the goods or in deceit. It is and was common knowledge that those who might be defrauded in this way would file their claims in the bankruptcy court, basing their claims on the right to recover for the goods. In fact it is to be presumed that nearly all such claimants would prove

up their claims. In providing the exception from release under Section 17 no distinction is made between those who have and those who have not proved their claims. The exception is broad enough to cover all.

If it should be held that proving one's claim for the goods prevents him from suing on the fraud *then proving his claim would likewise prevent him from objecting to a discharge on the ground that fraud had been practiced on him.* But we know that by the wording of the statute, objections can be made only by "parties in interest" (an expression twice used in Section 14 (b)). We also know that those whose claims have been allowed are "parties in interest." It has also been held that those who have claims based on fraud in obtaining goods (and whose claims are therefore not released by a discharge) are not "parties in interest."

Collier on Bankruptcy (9th Edition), p. 323.

In re Servis, 140 Fed., 222.

If counsel's argument that filing one's claim and having it allowed operates as a merger of his two causes of action and that the claim for deceit is swallowed up on the judgment for goods sold, then one whose claim had been allowed could not object to a discharge because he would no longer have any standing as one who had been defrauded. Neither would one who had been similarly defrauded but who had not filed his claim because he is not a party in interest, as his claim is not affected by the discharge.

Hence there would be no one to object to the discharge and the portion of the statute providing for objections to a discharge would be meaningless.

From these considerations it seems clear that it was never intended that the allowance of a claim should operate as a bar to the claimant's recovery for deceit. Nor is it easy to see why the benefit of the exception of Section 17 (2) should be granted to one who does not prove his claim and denied to one who does prove his claim. This part of the act is intended to prevent a discharge from operating on claims founded on deceit. To hold that it has no force as to claims provable as claims for goods but in reality based on fraud, would greatly limit its scope and permit dishonest debtors to escape from debts from which the act never contemplated they should be released. The statute would in fact become a trap for the unwary. While in the plainest language it exempts from the force of a discharge debts founded on fraud, yet it would appear after a creditor had proved his claim that his claim though founded on fraud was not in fact excepted and that the fraud-doer was released. Bearing in mind the purpose of this portion of the act such a construction of it would be little short of monstrous.

III.

EFFECT OF THE DISCHARGE.

It is claimed by petitioners that the order confirming the composition in bankruptcy discharges Talcott's claim asserted in the case at bar. It is first to be observed that *this question is not before this court on the record.* This issue was not so much as suggested on the trial, nor could it have been. It was pleaded in the trial court (Rec., 6, 8) in defendants' second and fourth pleas; the second alleging a discharge and the fourth a confirmation of composition. The trial court sustained Talcott's demurrers to both of these pleas. (Rec., 12.) No cross-errors were assigned in the Circuit Court of Appeals on the sustaining of the demurrers. As the record stood, this issue could not have been tried and in fact was not tried. The Circuit Court of Appeals had no occasion to pass on the effect of a discharge and the question is not now before this court. The only error relied upon in this court is that the Circuit Court of Appeals reversed the judgment of the Circuit Court. (Petitioner's Brief, 6.) The question of the effect of a discharge is not involved in such reversal.

But aside from this consideration the *confirmation of composition did not discharge Talcott's claim for deceit.* Talcott had a double claim, *i. e.*, for goods sold and delivered, and for deceit in inducing him to sell the goods. Assuming for the sake of argument that Talcott's claim was provable it would have been discharged by the confirmation had it not

been a claim having its origin in a fraudulent representation. The Bankruptcy Act expressly excepts *liabilities for procuring property by false representations* from the operation of a discharge. (Bankruptcy Act, Sec. 17a (2)).

The act before amendment excepted only *judgments* based on false representations—not liabilities other than those reduced to judgment. Of course, as stated by petitioners' counsel, prior to the amendment of the Bankruptcy Act on February 5, 1903, Talcott's claim would have been discharged because the claim based upon the fraud of obtaining property by false representations had not been reduced to judgment at the time of the bankruptcy. (*Crawford* v. *Burke*, 195 U. S., 176.)

But the amendment was passed before the liability arose, before the proceedings in bankruptcy were instituted, and before the confirmation order was entered. Under the amendment, liabilities (not judgments only) for obtaining property on false representations, are excepted from the discharge.

In many cases it has been squarely held that a discharge does not affect a liability for deceit or other similar tort.

(See cases in our Brief under this head.)

In *Katzenstein* v. *Reid, Murdoch & Co., supra,* it was held that filing objections to a discharge based on the deceit relied on in the subsequent suit does not preclude recovery for the deceit.

The cases of *Crawford* v. *Burke, supra,* and *Tindle* v. *Birkett,* 205 U. S., 183, cited by counsel for petitioners, are no authority whatsoever for the claim

that the discharge released Talcott's claim. Those cases turned in the construction of the clauses (2) and (4) of Section 17 of the Act before the amendment of 1903. These exempted from the discharge *judgments* in actions for frauds, etc., and such debts as were created by the fraud, embezzlement, etc., of the bankrupt while acting in a fiduciary capacity. In both cases the court held that since the claims in question were not reduced to judgment and were not created by the fraud of the bankrupt while acting in a fiduciary capacity, they were not excepted from the operation of the discharge. The question of whether or not they were dischargeable turned on the construction of clause (4) of Section 17 of the Act. The amendment of 1903, Section 17, clause (2), *expressly* excepts such debts as are liabilities for obtaining property by false representations. In other words the statute now covers the very point decided in those two cases, so that the questions there discussed cannot arise under the present act.

In the case entitled *In re Tinker,* 99 Fed., 79, there was an application for discharge. This was objected to by one holding a judgment for criminal conversation. The discharge was granted. The court holds that the proper method is to grant a discharge without determining its effect on any particular debt and that granting the discharge would not necessarily be *res judicata* as respects its effect as a release from this judgment. The case came before this court (reported as *Tinker* v. *Colwell,* 193 U. S., 473) on the question whether the judgment for damages was released by defendant's discharge in bankruptcy, *it*

being shown that the discharge was opposed on the very same ground urged for exempting it from the effect of a discharge. The court held that the bankruptcy proceedings did not discharge the debt.

In *Audubon* v. *Shufeldt,* 181 U. S., 575, the bankrupt's former wife, Florence Audubon, filed her claim for $800, being evidenced by a decree of a state court for arrears for alimony. She described it as a "debt" due to her. She voted thereon at the creditors' meeting. A discharge was granted over her objection that the claim for alimony was not a provable debt, and should be excepted from the effect of discharge. This honorable court held that the order granting a discharge as to the alimony was erroneous.

It probably would not be claimed that if Talcott had not filed objections to a discharge, he would be barred from maintaining his present suit. Section 17 contains nothing that would indicate that a discharge is to be operative as to claims expressly excepted from the operation of a discharge when owned by parties *who have* ~~not~~ objected to a discharge but not operative when owned by those *who have not objected.* It seems more reasonable to hold that it was intended that dishonesty should be discouraged and those who undertake to prevent a discharge by showing acts of fraud should not be penalized by inhibiting them from suing on claims based on the fraud, even though such persons tried to prevent a discharge. Unless some positive rule of law requires it, no such construction, we submit, should be placed on the statute.

But aside from this view of the subject, it appears that granting the discharge was not in any way equivalent to denying Talcott the right to recover in a suit for deceit. It was never intended that a discharge should release a bankrupt from all of his debts. Section 17 shows among the exceptions actions for false pretenses. The proper practice is for the court to grant a discharge and try the question whether a given claim is barred by the discharge in bankruptcy when a suit is commenced on such claim.

Collier on Bankruptcy (9th Ed.), p. 383.
In re Rhutassel, 96 Fed., 597.
In re Thomas, 92 Fed., 912.

So that the discharge of the bankrupt in itself means nothing unless it be clearly shown in the subsequent action that the claim sued on is not within the exceptions set out in Section 17. Nor is it any answer to say that Section 17 is for the benefit of those only who keep out of the bankruptcy court. If counsel's contention were upheld no creditor, even though his claim is excepted from the operation of the discharge, would venture into a bankruptcy court either to prove his claim or object to a discharge. According to counsel's argument he would have to submit all of his evidence and effectually prevent a discharge or be barred from thereafter presenting his claim. He might in fact file objections, which in point of law amount to nothing at all, and yet be thereby barred from subsequently asserting his claim. In Talcott's case the master held that in law his objections were not good.

The master in effect struck them from the files. It was therefore as if Talcott had filed no objections at all, and yet we are told that his claim is barred *because he filed objections.* Since Talcott's objections amounted to nothing, he was in exactly the same position as those who filed no objections at all, and no one contends that the discharge is binding on those who do not appear and object in the bankruptcy proceeding.

There seems no good reason for believing that Congress did not intend by Sections 14 and 17 to give a defrauded creditor two rights: first, to prevent a discharge, and, second, notwithstanding the discharge to allow a creditor to recover for fraud practiced upon him. The first goes to the rights of the debtor and affects his right to have or not to have a discharge. It is in the nature of a punishment for wrongdoing. The second is simply that the injured party may not be barred of the right he has at common law. It would seem that the two provisions are quite consistent and work no hardship on the debtor. The bankruptcy court first passes on the question of discharge; the other court where the claim is asserted then passes on the fraud and its injury to the claimant. A construction of the act that will uphold all its provisions and reconcile them will be adopted rather than a construction that limits or curtails at least one section of the act.

The plain purpose of the act is to discourage fraud, first by denying a discharge, and then by excepting from the operation of the discharge claims originating in fraud. No good reason appears for

putting a premium on fraud and in effect removing from the statute one of the provisions against it.

As a ground for emasculating the statute counsel for petitioners would have the court hold that Sections 14 and 17 are in conflict. They say (p. 64):

> "If no discharge is to be granted to a bankrupt guilty of making a false statement in writing, it seems a work of supererogation to specify the effect of such discharge if granted."

We submit that the two sections of the statute are perfectly and exactly consistent with each other. The one prevents a discharge *if evidence is produced of wrongdoing;* the other prevents a release from liability even though the discharge in bankruptcy is allowed, as where no objection is made or the grounds stated as objections are insufficient.

Under the old act there was a wholesale court delivery of bankrupts who were guilty of fraud because under it no proof of obtaining property by false representations was sufficient to prevent a discharge. Neither was a claim based on fraud exempted from the force of a discharge unless it was reduced to a judgment. By the amendments, to both Section 14 and Section 17 it is apparent Congress intended to discourage fraudulent practices by prospective bankrupts. To effectuate this purpose it provided, first, against discharge if fraud were shown and, second, against the release of the bankrupt from claims based on fraud even though the debtor slipped through the bankrupt court without objection on the part of the victims of his fraud.

The Circuit Court of Appeals (Rec., 47), expressly holds that Talcott's claim for deceit is within the

second exception of Section 17, and shows that Sections 14 and 17 are perfectly consistent. It is there said that they treat of different subjects,—one the considerations on which a discharge will be granted, the other the effect of a discharge if granted. (*Katzenstein* v. *Reid*, 41 Tex. Civ. App., 106, 16 A. B. R., 740.) Not being in *pari materia* one section does not limit the other. It is also suggested there that if Section 14b (3) is interpolated into Section 17 (2) we would have the absurd situation of those who practice fraud being liable, despite their discharges, if their false statements are not reduced to writing, but not liable if the statements are written. Congress cannot reasonably be presumed to have intended such an absurdity. It is no answer to say that this situation cannot arise since if there is a written deceit there will be no discharge. There might be no evidence of written deceit before the Bankruptcy Court and a discharge would therefore be granted, and yet, under such a construction of the act, the written deceit would be excused and the oral deceits still constitute actionable claims.

In conclusion we submit that Talcott is entitled to a hearing on the merits of his case; that nothing was adjudicated in the bankruptcy court that in any way conflicts with Talcott's present claim; that there was no waiver and no merger and that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Horace Kent Tenney,

R__a Sherman,

Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No.

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

PETITION FOR CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioners, Henry Friend, Solomon C. Moss and Henry Morris, respectfully represent that:

1. Your petitioners are citizens of the State of Illinois and reside in the City of Chicago in said state, and are engaged in mercantile business as co-partners under the style of Friend, Moss & Morris. Respondent James Talcott is a citizen of the State of New York, residing at the City of New York in said state.

2. On the 27th day of April, 1905, respondent

commenced an action of trespass on the case against your petitioners in the Circuit Court of the United States for the Northern District of Illinois. His declaration (Rec., 4) alleged that on the 21st day of January, 1903, plaintiff (respondent) was engaged in business as a dry goods commission merchant in New York City, and the defendants (petitioners) were engaged in business as merchants in the City of Chicago, under the firm name of Friend, Moss & Morris, and the Woods Dry Goods Commercial Agency was a commercial agency in New York City; that on said 21st day of January, 1903, defendants made a statement of the financial condition of said firm to said commercial agency, which statement was intended by them to be communicated by the agency to persons inquiring as to the financial condition of said firm, to be acted upon by them when requested by the defendants to sell them goods on credit; that in and by said statement defendants represented that on the 31st day of December, 1902, said firm had total assets of $192,583.08 and total liabilities amounting to $99,594.13, and had a net surplus over and above all its debts and liabilities amounting to $92,988.95.

It was further alleged in said declaration that afterwards, on February 5th, 1903, the Woods Dry Goods Commercial Agency communicated said statement to plaintiff; that he relied upon the representations therein made and believed them to be true and thereafter on divers days sold and delivered to defendants goods upon credit, and that for a portion of the goods so sold and delivered defendants had failed to pay the plaintiff a part of the purchase

price, which still remained unpaid; that said statements and representations were false and fraudulent and known to be so by the defendants; that said firm did not have on December 31st, 1902, assets amounting to $192,583.08; that their liabilities on said date largely exceeded $99,594.13; that they did not have a net surplus amounting to $92,988.95; but that said firm of Friend, Moss & Morris was on December 31st, 1902, and continued to be during the time the plaintiff sold and delivered goods as aforesaid, wholly insolvent.

3. To this declaration defendants pleaded several pleas, among them a plea of former adjudication (Rec., 16), in which they averred that on February 1st, 1904, they were adjudicated bankrupts by the District Court of the United States for the Northern District of Illinois; that the plaintiff entered his appearance in said bankruptcy proceedings and filed therein his claim for the sum of $3,204.91, on account of the goods sold and delivered by him, as in his declaration mentioned; that said claim was allowed by said District Court; that thereafter in said bankruptcy proceedings defendants offered terms of composition to their creditors, which were accepted by a majority in number and amount of creditors; that on March 12th, 1904, defendants filed in said District Court their petition for confirmation of said composition; that the plaintiff opposed said composition and on April 2nd, 1904, filed specifications of objections thereto, in which he alleged

> "That said bankrupts obtained from said James Talcott and from other creditors prop-

erty upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining such property upon credit; that said statement was so made on or about the 21st day of January, 1903, to Woods Dry Goods Commercial Agency, which as said bankrupts knew was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to be communicated to those from whom they sought such credit; that said statement was duly communicated to said James Talcott and to others by said Commercial Agency for the purpose of being acted upon by them in selling goods to said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon said statement; that by the statement so made in writing by said bankrupt it was averred that they had a net surplus on January 1, 1903, of $92,988.95 over and above all debts and liabilities, whereas, in truth and in fact they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time said statement was made, but were not known to said James Talcott and other creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition, in bankruptcy herein." (Rec., 17.)

It was further averred in said plea that the statement mentioned in said objections to the composition was the same statement alleged in plaintiff's declaration in the present action; that on the 7th day of May, 1904, the petition for confirmation of composition came on to be heard before the District Court and said court entered of record a final de-

cree confirming said composition, which decree reads as follows:

"This matter coming on to be heard on the exceptions to the report of Referee F. L. Wean on the objections to the confirmation of the composition agreement entered into herein, come the parties by their solicitors, and after arguments of counsel the court being fully advised in the premises overrules said exceptions and approves said report. And it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the acts of Congress relating to bankruptcy; it is therefore ordered

Ordered that the said composition be and it is hereby confirmed. It is hereby further

Ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit:

1st. To pay the several claims which have priority;

2nd: To pay the costs of proceedings;

3rd: To pay, according to the terms of the composition, the several claims of general creditors, which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order,

To which orders of the court the Pontoosuc Woolen Manufacturing Company and James

> Talcott, jointly, by their solicitors, duly except, and enter their motion for an appeal from said order to the United States Circuit Court of Appeals for the Seventh Circuit; whereupon the court fixes the amount of the appeal bond at the sum of fifty thousand dollars ($50,000)." (Rec., 18.)

The plea further alleged that said decree so entered on March 7th, 1904, is still in full force and effect. That it is provided in Section 14b of the Bankruptcy Act that it shall be a bar to the discharge of any bankrupt if he has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit. By reason whereof defendants averred that all the matters and things in plaintiff's declaration alleged had been already litigated in and adjudicated by said District Court for the Northern District of Illinois.

4. Plaintiff demurred to this plea (Rec., 20). His demurrer was overruled (Rec., 21) and thereafter he filed by leave of court several replications to said plea. The first replication merely denies in general language that the matters alleged in the declaration were litigated in and adjudicated by the District Court. The second replication pleads *nul tiel record.*

The third replication avers (Rec., 22):

> "That the specifications of objections to the confirmation of said composition mentioned in said plea were in the conduct of said proceedings referred to Honorable Frank L. Wean, Referee in Bankruptcy of said Court, as Special Master, for hearing, and that said Special Master made his report thereupon, in which, among

other things, he found and held with reference to said specifications mentioned in said plea as follows, to wit:

'As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of Section 14-b (3) would require the 'materially false statement in writing' to be made directly to the creditor in question, and I deem the allegations in this specification, which are to the effect that the alleged false statement was made to a commercial agency, to be insufficient, and I am of the opinion that the specification should be overruled for this reason.'

Plaintiff further avers that thereafter in the conduct of said procedings said report of said referee was duly approved by said court and that said matters and things in said declaration alleged were not by said report and by the decree in said plea mentioned litigated in and adjudicated by said District Court of the United States for the Northern District of Illinois in said proceedings mentioned in said plea."

5. The issues thus raised between the parties as to a former adjudication were tried by the court without a jury.

After hearing the evidence the court entered a special finding of facts, reciting at length the bankruptcy proceedings substantially as averred in the pleadings (Rec., 24), and also a general finding

"that the matters and things involved in this suit were fully adjudicated in said bankruptcy proceedings, and that the plaintiff is not entitled to a recovery in this case" (Rec., 30),

and thereupon entered final judgment against respondent.

6. Respondent sued out a writ of error from the Circuit Court of Appeals for the 7th Circuit, and on the 4th day of December, 1909, said court entered its judgment reversing the judgment of the Circuit Court. A petition for rehearing was filed by your petitioners, on the 13th day of January, 1910, and on the 10th day of June, 1910, an order was entered by the Circuit Court of Appeals denying such petition.

7. In its opinion (Rec., 57) the Circuit Court of Appeals stated as its reasons for reversing the judgment that:

I. An action against a purchaser of goods for false representations and an action for the purchase price are both based upon an affirmance of the contract and therefore are not inconsistent; hence the filing in the bankruptcy proceedings by respondent of his claim for goods sold and the allowance of such claim was no waiver of the present action for deceit.

II. The order of the Bankruptcy Court confirming the composition, and its finding that the bankrupts had not been guilty of any of the acts which would be a bar to discharge, did not amount to an adjudication that they had not been guilty of obtaining property from plaintiff upon a false statement in writing, because,

(a) In the bankruptcy all creditors were interested adversely to petitioners, in the action for deceit, respondent only. Hence there was no identity in interest of the parties.

(b) In the bankruptcy petitioners were defendants in the capacity of insolvent debtors, in the action for deceit in the capacity of "fraud-doers (separate and distinct from their capacity of contractors * * *)." Hence petitioners defended in different capacities in the two suits.

(c) In the bankruptcy, respondent was plaintiff in the capacity of a representative of all parties interested in opposing the discharge, while in the action for deceit respondent was plaintiff "in the capacity of the solitary victim of their deceit." Hence respondent prosecuted in different capacities in the two suits.

(d) In the bankruptcy the only proper issue was the right to a discharge as against all parties in interest. Hence there was lacking an identity of issues in the two suits.

(e) Inasmuch as the District Court held respondent's specifications insufficient, and excluded evidence of the making of the false statement, its finding should be read as meaning that the bankrupts "had not been shown to be guilty of any of the acts which would be a bar to a discharge," not that they were in fact not guilty.

III. The composition confirmed by the court did not discharge the liability of petitioners to respondent because,

(a) The cause of action for deceit was not a provable debt in bankruptcy.

(b) Even if it were a provable debt, it was excepted from the operation of a discharge (and con-

sequently of a composition) by the second exception in Section 17 of the Bankruptcy Act.

8. Your petitioners are advised by counsel that such decision of said Circuit Court of Appeals in each of the respects above set forth is not well-founded in law, and that the same is inconsistent with decisions in similar cases of this court and of courts of the United States in other circuits, and that in order to secure uniformity of decision thereupon and because the questions involved in said decision are of gravity and importance your petitioners are advised by counsel and believe that said decision of said Circuit Court of Appeals ought to be reviewed and the questions involved therein be finally determined by this court upon a writ of certiorari to said Circuit Court of Appeals.

9. Your petitioners present and file herewith a brief setting forth the grounds upon which they conceive the said judgment of said Circuit Court of Appeals to be erroneous as aforesaid.

Your petitioners also present herewith a copy, duly certified by the clerk of said Circuit Court of Appeals, of the record upon which said cause was argued, heard and determined by said Circuit Court of Appeals, and also a copy, duly certified by said clerk, of the proceedings had and papers filed in said Circuit Court of Appeals.

WHEREFORE your petitioners pray that this court issue a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, directing it to certify said cause to this court for its

review and determination, to the end that justice may be done to your petitioners according to law.

HENRY FRIEND,
SOLOMON C. MOSS,
HENRY MORRIS.

JACOB NEWMAN,
S. O. LEVINSON,
BENJAMIN V. BECKER,
ARTHUR B. SCHAFFNER,
Of Counsel.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Arthur B. Schaffner, being duly sworn, deposes and says that he is of counsel for the petitioners named in and who subscribed the foregoing petition; that he is familiar with the matters and things in said petition contained and that the same is true in substance and in fact; that this affidavit is made by him instead of being made by his said clients or any of them, because the matters alleged in the petition, relating almost wholly to proceedings in court, are better known to affiant than to his clients.

ARTHUR B. SCHAFFNER.

Subscribed and sworn to before me this 25th day of October, A. D. 1910.

FRED W. REINHARDT,

(NOTARIAL SEAL) *Notary Public in and for Cook County, Illinois.*

Office Supreme Court, U. S.
FILED.
OCT 31 1910
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. [redacted] 155.

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER,
ARTHUR B. SCHAFFNER,
Counsel for Petitioners.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No.

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

In our petition, the material facts are fully set forth. Hence we now limit ourselves to such a brief re-statement thereof as may refresh the recollection of the court and prepare it to consider the legal questions involved and the errors committed, as we contend, by the Circuit Court of Appeals for the Seventh Circuit.

Respondent commenced the present action in the

Circuit Court for the Northern District of Illinois on April 27, 1905. (Rec., 2.) The declaration (Rec., 4) charges (1) that petitioners on or about January 21st, 1903, knowingly made a false statement in writing of their financial condition to a certain mercantile agency with intent that the same should be communicated to the trade; (2) that the same was thereafter communicated by the agency to respondent; (3) that in reliance thereon he sold goods to petitioners; and (4) that a portion of the purchase price thereof remains unpaid.

To this declaration petitioners, among other pleas, pleaded by way of former adjudication (Rec., 16) that in 1904 they had been adjudicated bankrupt, that respondent had filed in the bankruptcy proceedings his claim for the purchase price of the goods so sold, that said claim had been duly allowed; that they had offered a composition to their creditors to which respondent had objected on the specific ground of the making of said alleged false statement; that said objections had been overruled and the composition confirmed by the court in an order expressly finding that petitioners had not been guilty of any of the acts which would be a bar to a discharge; that by Section 14b of the Bankruptcy Act the obtaining of property upon a false statement in writing is a bar to a discharge. Respondent replied by averring that the referee to whom the matter of the composition had been referred had recommended that his objections be overruled as insufficient; that the referee's report had been approved by the court, and that therefore there was no former adjudication.

The issue of former adjudication thus raised was tried before the Circuit Court without a jury. The court entered a special finding of facts (Rec., 24), in which he found the facts to be substantially as alleged in the pleadings, together with a general finding that there had been a former adjudication, and accordingly rendered judgment in favor of petitioners (Rec., 30). Upon writ of error to the Circuit Court of Appeals for the Seventh Circuit, that court handed down an opinion (Rec., 57 *et seq.*), which may be fairly summarized as follows:

I. An action against a purchaser of goods for false representations and an action for the purchase price are both based upon an affirmance of the contract, and therefore are not inconsistent; hence the filing in the bankruptcy proceedings by respondent of his claim for goods sold and the allowance of such claim was no waiver of the present action for deceit.

II. The order of the bankruptcy court confirming the composition, and its finding that the bankrupts had not been guilty of any of the acts which would be a bar to a discharge (which, as petitioners contend, necessarily included a finding that they had not been guilty of obtaining property upon a false statement in writing), did not amount to a former adjudication of the cause of action, because

(a) In the bankruptcy, all creditors were interested adversely to petitioners, in the action for deceit respondent only. Hence there was no identity in interest of the parties.

(b) In the bankruptcy, petitioners appeared in the capacity of insolvent debtors, in the action for

deceit in the capacity of "fraud-doers (separate and distinct from their capacity of contractors * * *)" Hence petitioners defended in different capacities in the two suits.

(c) In the bankruptcy, respondent appeared in the capacity of a representative of all parties interested in opposing petitioners' discharge, while in the action for deceit respondent was plaintiff "in the capacity of the solitary victim of their deceit." Hence respondent prosecuted in different capacities in the two suits.

(d) In the bankruptcy the only proper issue was the right to a discharge as against all parties in interest. Hence, there was no identity of issues in the two suits.

(e) Inasmuch as the District Court held respondent's specifications insufficient, and excluded evidence of the making of the false statement, its finding should be read as meaning that the bankrupts "had not been shown to be guilty of any of the acts which would be a bar to a discharge," not that they were in fact not guilty.

III. The composition confirmed by the court did not discharge the liability of petitioners to respondent because,

(a) The cause of action for deceit was not a provable debt in bankruptcy.

(b) Even if it were a provable debt, it was excepted from the operation of a discharge (and consequently of a composition) by the second exception in Section 17 of the Bankruptcy Act.

Accordingly the judgment of the Circuit Court was reversed and the cause remanded. We now pray that the case be reviewed by this court upon certiorari. In support of our prayer, we respectfully submit:

First: That each and every proposition of law stated or implied in the opinion of the Court of Appeals is fundamentally erroneous in principle.

Second: That in so far as such propositions have been passed upon by this court, the conclusions of the Circuit Court of Appeals are in direct conflict with those reached by this court.

Third: That the case is one of importance, because it involves the basic principles of the law of bankruptcy, of *res judicata* and of collateral attack upon judgments rendered by courts of the United States, and also because there has been no previous opportunity, so far as we are advised by the reported cases, for this court to express its opinion of the effect of the amendatory act of February 5, 1903, upon the right to a discharge.

As our primary task is to satisfy the court that it ought to take jurisdiction, we call attention to a few reasons why the case should be reviewed and determined by this court.

The power to grant the writ of certiorari is exercised by this court, as it has frequently announced, only in cases of gravity and importance. That the Circuit Court of Appeals itself deemed this case such may be inferred from the fact that although argued on January 26, 1909, it was held under advisement until December 4, 1909, and that the petition for re-

hearing filed January 13th, 1910, was not decided until June 10, 1910.

It happens that the suit was commenced in a Circuit Court of the United States and thence taken by writ of error to the Circuit Court of Appeals. It might equally well have been commenced by respondent in a state court and been reviewed on writ of error in the Appellate or Supreme Court of Illinois. The question whether respondent's cause of action was a provable claim in bankruptcy—decided in the negative by the Circuit Court of Appeals, in the affirmative by this court in *Tindle* v. *Birkett,* 205 U. S., 183—might have arisen on a contest of the claim in the bankruptcy court, and then been carried by appeal to the Circuit Court of Appeals.

In either of these events, petitioners would have been of right entitled to a review by this court, upon appeal or writ of error. In the former case, that is, of a suit brought in a state court, a writ of error would lie because of the decision adverse to the right claimed by petitioners under the laws of the United States providing for their discharge. If the issue had arisen in the bankruptcy proceeding itself, then since there would have been involved an amount exceeding $2,000 and a right claimed under the laws of the United States, an appeal might have been taken to this court from the Circuit Court of Appeals under Section 25b of the Bankruptcy Act.

The questions involved in the case at bar are therefore questions of a nature which Congress has seen fit to declare, under some circumstances at least, of sufficient importance to justify their consideration

by this court. The accident of the case originating in a Federal Circuit Court, instead of in a state court or a District Court sitting in bankruptcy, requires us now to pray of the court's grace what under those circumstances we might have demanded as our right.

No question of fact is involved in the decision of the Court of Appeals. The issues are all issues of law, involving the construction of the Acts of Congress relating to bankruptcy and the application of the general rules of the law of judgments. The comparatively recent enactment of the Bankruptcy Act and the consequent doubt in which its proper interpretation is involved, the necessity of a uniform construction of its provisions throughout the United States, all tend to induce the court to be liberal in granting certiorari in bankruptcy cases.

No occasion has heretofore arisen for this court to announce its views upon the proper interpretation and construction of those provisions in the amendatory act of February 5, 1903, relating to discharge. If, as we contend, that act did not change the law bearing upon the facts shown in this record, then the decision of the Circuit Court of Appeals clearly denied to petitioners the benefit of their discharge.

In *Tindle* v. *Birkett,* 205 U. S., 183, this court held that a cause of action for fraudulent representations inducing a sale of merchandise was barred by a discharge. No mention of that decision occurs in the opinion of the Circuit Court of Appeals.

Possibly—although we believe to the contrary—*Tindle* v. *Birkett* is no longer law since the act of

1903. But an authoritative decision to that effect can come only from this court.

In addition to denying to petitioners, as we claim, the benefit of their discharge, the Circuit Court of Appeals permitted a collateral attack upon the judgment of the District Court and, in effect, held—contrary to the decisions of this court in *Shawhan* v. *Wherritt,* 7 How., 627, and *Blutenthal* v. *Jones,* 208 U. S., 64, and contrary to its own former decision in *Magnus* v. *Ketcham,* 112 Fed., 752—that judgments of courts of bankruptcy are not operative as *res judicata.*

Naturally, it is difficult for us to prove all this to the court in a mere preliminary statement. We refer to these matters now, out of their proper order, merely to indicate to the court, *in limine,* why we feel justified in calling upon it to exercise its authority. The nature and effect of the decision of the Court of Appeals can be fully understood only by considering its opinion in detail; and to that we accordingly proceed.

BRIEF OF THE ARGUMENT.

I.

The record of the bankruptcy proceedings evidenced an election of remedies by respondent, which barred his suit for fraudulent representations:

(a) By filing a claim for goods sold and thus affirming the contract, respondent waived all claims for deceit.

Tindle v. *Birkett*, 205 U. S., 183.

Adler v. *Fenton*, 24 How., 407.

Lincoln v. *Claflin*, 7 Wall., 132.

Simon v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. Rep., 573.

(b) The judgment of the bankruptcy court allowing his claim for goods sold, operated as a merger of all his causes of action.

1. A judgment merges not only the cause of action sued on but all concurrent remedies, even if consistent.

Barth v. *Loeffelholtz*, 108 Wis., 562.

Caylus v. *N. Y. K. & S. R. R. Co.*, 76 N. Y., 609.

Bowen v. *Mandeville*, 95 N. Y., 237.

Morgan v. *Skidmore*, 3 Abb. N. Cas. (N. Y.), 92.

Brumbach v. *Flower*, 20 Ill. App., 219.

Karr v. *Barstow*, 24 Ill., 580.

2. The order of a court of bankruptcy allowing a claim is a judgment.

Kuehling v. *Leberman*, 2 Wkly. N. C. (Pa.), 616.

Mitchell v. *Mayo*, 16 Ill., 83.

Wheeler v. *Dawson*, 63 Ill., 54.

3. That such judgment is not so efficient as another remedy might be, does not change the rule.

Karr v. *Barstow*, 24 Ill., 580.

(c) By appearing in the bankruptcy proceedings and opposing petitioners' discharge, respondent elected to treat his claim as one not excepted from the operation of a discharge in bankruptcy.

(d) By taking the position in the bankruptcy court that the statement to Woods Dry Goods Commercial Agency was a false statement sufficient to bar a discharge, respondent elected to submit to that forum the effect of such statement on all his rights against petitioners.

II.

The order confirming the composition discharged petitioners from respondent's claim.

(a) Respondent's claim was provable.

Crawford v. *Burke*, 195 U. S., 176.

Tindle v. *Birkett*, 205 U. S., 183.

(b) It is not excepted from the operation of a discharge.

Tindle v. *Birkett*, 205 U. S., 183.

1. The view that a claim based upon a false statement in writing is not barred by a discharge (1) is destructive of the objects of the bankruptcy law; (2) involves the attribution to Congress of an intention to permit the same point to be twice litigated, and to allow the judgments of courts of bankruptcy to be collaterally attacked; (3) involves the proposition —which respondent is estopped to urge—that

he had no right to appear in opposition to the composition.

Bankruptcy Act 1898 (as amended 1903), sections 14b, 17.

2. Even if it be assumed that Congress intended to give to a creditor to whom a false statement in writing had been made, the option either to oppose a discharge or to sue notwithstanding a discharge, respondent exercised such option by appearing in the bankruptcy court.

(c) The confirmation of a composition has the same effect as a discharge.

Bankruptcy Act 1898, section 14c.

III.

The order confirming the composition was a complete adjudication against respondent's right of action.

Abendroth v. *Van Dolsen,* 131 U. S., 66.

Blutenthal v. *Jones,* 208 U. S., 64.

Southern Pacific Railroad Co. v. *United States,* 168 U. S., 1.

Magnus v. *Ketcham,* 112 Fed. Rep., 752.

Northern Pac. Ry. Co. v. *Slaght,* 205 U. S., 122.

U. S. v. *California & Oregon Land Co.,* 192 U. S., 355.

Shawhan v. *Wherritt,* 7 How., 627.

Gunter v. *Atlantic Coast Line,* 200 U. S., 273.

Deposit Bank v. *Frankfort,* 191 U. S., 499.

Jeter v. *Hewitt,* 22 How., 352.

(a) The same legal rights were involved in both proceedings:

On the part of Talcott, his rights arising out of the sale and the obligations to him which petitioners thereby incurred; on the part of petitioners, their right to be discharged from such obligations.

(b) That the bankruptcy proceedings also involved similar rights of other creditors is immaterial.

(c) Both respondent and petitioners appeared in the same capacity in both proceedings.

1. Although Talcott represented other creditors in the bankruptcy, he also appeared for himself.

Corcoran v. *C. & O. Canal Co.*, 94 U. S., 741.

2. Petitioners, appearing on their own behalf in both proceedings, appeared in the same capacity.

U. S. v. *California & Oregon Land Co.*, 192 U. S., 355.

IV.

Neither the reasons assigned by the District Court for holding respondent's specification insufficient, nor such holding itself, detract from the legal efficacy of the order confirming the composition as an adjudication of the rights of the parties.

Fayerweather v. *Ritch*, 195 U. S., 276.

Gunter v. *Atlantic Coast Line*, 200 U. S., 273.

Deposit Bank v. *Frankfort*, 191 U. S., 499.

Northern Pacific Ry. Co. v. *Slaght*, 205 U. S., 122.

ARGUMENT.

I.

The Circuit Court of Appeals decided that the filing of a claim for the contract price of the goods sold, was no bar to an action for deceit, because the two causes of action are consistent. Although there is authority for this view in decisions of state courts, the rule in this court is otherwise.

In *Adler* v. *Fenton,* 24 How., 407, an action was brought by certain creditors of Adler and Schiff against the debtors jointly with other defendants, alleging a conspiracy to dispose of their property fraudulently to the injury of creditors. Prior to beginning the suit plaintiffs had commenced an action against Adler and Schiff for the purchase price of the goods sold them. In holding that the action for conspiracy would not lie, this court said:

> "In the present suit, the plaintiffs do not allege that they were defrauded in the contract of sale of their merchandise, although there is abundant testimony to show that the purchases were made by Adler and Schiff, with the intention of defrauding their vendors. But the plaintiffs, by electing to sue for the price, have waived that fraud, and confirmed the sale. Adler and Schiff were the lawful owners of the property at the time this suit was commenced."
>
> *Adler* v. *Fenton,* 24 How., 407, 411.

In the subsequent case of *Lincoln* v. *Claflin,* 7 Wall., 132, an action was brought by Claflin, alleging that by means of fraudulent representations as to their

financial condition, the defendants had obtained large quantities of goods from him. In sustaining the right of plaintiff to recover, the court, while re-affirming the rule in *Adler* v. *Fenton, supra,* distinguished the two cases as follows:

> "The action in this case is brought to recover damages against the defendants for fraudulently obtaining the property of the plaintiffs. It differs materially from that of *Adler* v. *Fenton,* reported in 24th Howard, which is cited to show that the declaration discloses no cause of action. * * * The case at bar is not brought upon the allegation that the defendants have fraudulently disposed of their own property, but that they have fraudulently obtained possession of the property of the plaintiffs. It proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were obtained by false and fraudulent representations."
>
> *Lincoln* v. *Claflin,* 7 Wall., 132, 137.

These cases have never been overruled by this court. They show that the true ground of an action to recover for damages sustained by false and fraudulent representations is not that the plaintiff has thereby been induced to enter into a valid contract transferring the title to the property, but that the plaintiff, although title has never passed from him, has lost possession through fraud.

That an action for fraudulent representations is inconsistent with an affirmance of the contract is also a necessary corollary from the opinion delivered by Mr. Justice Lurton, as a judge of the Circuit Court of Appeals for the Sixth Circuit, in *Simon* v.

Goodyear Metallic Rubber Shoe Co., 105 Fed. Rep., 573. True, the point actually decided was narrower, namely, that a defrauded vendor who discovers the fraud while the contract is still executory and nevertheless continues to perform the contract, thereby waives all claim for the deceit. On principle, however, this involves the primary proposition. If a suit upon the contract is consistent with a claim for fraud, if an express affirmance of an executed contract does not waive the fraud, there is no reason why performance of the contract, while executory, should do so. A waiver can arise only where two positions are inconsistent.

The action for fraudulent representations cannot be maintained after an election to perform the contract because it is based, not on an affirmance of the contract, but on a disregard of it. The fraudulent purchaser is treated, for the purpose of the action, as having received the plaintiff's goods, not under authority of a valid contract, but without right. If therefore, the plaintiff concedes his right by continuing performance after knowledge of the fraud, he has condoned the fraud.

That the true ground of the liability for fraudulent representations is the obtaining of another's goods by fraud, rather than the inducing of a contract by fraud, is illustrated by the measure of damages in such cases. The damages in an action of deceit, whether brought by a vendor or purchaser, are not based on the contract price, but are limited to the plaintiff's actual loss, that is, the difference in value betwen the property or money which the

plaintiff has lost and the property or money which he has received.

Smith v. *Bolles,* 132 U. S., 125.
Sigafus v. *Porter,* 179 U. S., 116.

> "In such an action the measure of damages would not be the value of the contract if the representations which induced it had been true, but the loss which was incurred by reason of its execution. What the plaintiff might have gained would not have been recoverable, but only the loss which he sustained by its actual execution."
>
> *Simon* v. *Goodyear Metallic Rubber Shoe Co.,* 105 Fed. Rep., 573, 579.

That an action for fraudulent representations is not consistent with an action for the purchase price, but like an action for conversion, rests upon a disaffirmance of the contract, is further made clear by the opinions of this court in *Crawford* v. *Burke,* 195 U. S., 176, and *Tindle* v. *Birkett,* 205 U. S., 183. Neither of them seems to have been considered by the Circuit Court of Appeals.

By deciding *Tindle* v. *Birkett,* as this court did, expressly on the sole authority of *Crawford* v. *Burke,* this court necessarily decided that the two cases were governed by the same principles.

In *Crawford* v. *Burke* a claim for conversion was held a provable claim because the plaintiff might have waived the tort and sued in assumpsit upon a contract implied by law. The Circuit Court of Appeals attempts to distinguish such a case from the one at bar as follows:

"A waiver of the tort would be held to be the

> basis of the fiction that there was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with the contract's existence is necessary to the contract's enforcement."
>
> Opinion (Rec., 61).

If we understand this correctly, it means that where goods are obtained by fraud, the owner may waive the tort and sue upon an implied contract of sale, and that such a suit is inconsistent with an action based on the fraud; but where the owner is induced to sell by fraud, then he can sue for the contract price and also for the fraud, and there is no inconsistency. The merits of this distinction are, to say the least, not obvious.

If an action upon the contract price and an action for the fraud are consistent and concurrent remedies, then it follows either (1) that a claim for fraudulent representations is not provable in bankruptcy at all, or (2) that it is provable as an independent claim, irrespective of a claim on the contract. The Circuit Court of Appeals adopted the former alternative and held that the claim was not provable at all. This is clearly wrong, as this court has expressly held such a claim provable.

Tindle v. *Birkett*, 205 U. S., 183.

The other alternative is subject to various objections. It would logically permit a defrauded vendor to file two claims in the bankruptcy of his debtor, one, a claim for the purchase price, and the other, a claim for the fraudulent representations, thus allowing him to recover double the dividend paid to ordi-

nary creditors, a startling consequence in view of the policy of the bankruptcy acts to treat creditors alike.

It is difficult, moreover, to find in the language of Section 63 any color for such a theory. Such a claim, being *ex hypothesi* a cause of action in tort, existing independently of the cause of action on the contract and concurrently with it, could not be said to be "founded upon a contract, express or implied."

The only way in which these various difficulties are overcome is by holding that the action for fraudulent representations is inconsistent with the action in contract, but that inasmuch as the tort may be waived, the cause of action, while not in and of itself a provable claim, may by election become a mere debt and thus provable in bankruptcy. In *Tindle* v. *Birkett* this court so held.

Tindle v. *Birkett* was decided by this court, as we have already noted, expressly on the authority of *Crawford* v. *Burke*. That is, in the view of this court, a claim for conversion, which is confessedly inconsistent with a right of action on contract, is governed by the same principles as a claim for fraudulent representations. Both are inconsistent with a claim on the contract and are provable in bankruptcy only because of the right of election.

In the case at bar, respondent exercised his right of election and filed his claim as for goods sold. He thus affirmed the contract and waived any right of action for the fraudulent representations.

The cases cited by the Circuit Court of Appeals in support of its holding that there was no such waiver

do not call for extended comment, in view of the decisions of this court cited by us. *Frey* v. *Torrey*, 70 App. Div., 166, was expressly disapproved by this court in *Crawford* v. *Burke*. It was subsequently overruled by the New York Court of Appeals in *Tindle* v. *Birkett*, 183 N. Y., 267, which was affirmed by this court in *Tindle* v. *Birkett, supra*.

II.

Even if we should concede the position taken by the Circuit Court of Appeals, that the remedies by action for the purchase price and for deceit are consistent and that both rest on an affirmance of the contract—which concession could be made only upon the assumption that this court erred in *Adler* v. *Fenton*, *Lincoln* v. *Claflin* and *Tindle* v. *Birkett*,—still the result reached by the Circuit Court of Appeals would not follow.

Respondent did more than simply elect to affirm the contract. By filing his claim and procuring an allowance thereof by the bankruptcy court, he in legal effect secured a judgment for the purchase price of the goods sold.

Where a party has distinct remedies which are not inconsistent but may be pursued concurrently, a judgment in one action will operate as a merger, not only of the cause of action in that suit, but of all other concurrent causes of action.

The difference between this principle and the ordinary rule with respect to election of remedies, is that where the remedies are inconsistent, an election

takes place as soon as the party has undertaken to pursue one remedy rather than the other. By so doing he then waives all inconsistent remedies.

Where the remedies are not inconsistent they may be pursued concurrently. Nevertheless when the prosecution of either remedy has resulted in a judgment, all other causes of action growing out of the same matter and against the same party are merged in the judgment, because a judgment on the one cause of action covers the whole ground.

> "The doctrine of merger applies only where the situation is the reverse of that which is ruled by the law as regards the election of remedies, though the legal effect is the same, *i. e.*, to confine the plaintiff to a single remedy. In the latter situation the remedies are always inconsistent; in the former always consistent. In the latter there can be but one remedy resorted to, though there be several at the start, because, while each of them stands for a specific right, the several rights are alternatives. In the former, one can have but the single remedy, because, though there are several remedies standing for concurrent rights in form, the enforcement of one reasonably covering the entire field, by a rule of judicial policy, draws to it and absorbs the others, such policy being a species of equitable interference with legal remedies where they are uselessly multiplied."
>
> *Barth* v. *Loeffelholtz,* 108 Wis., 562, 571.

Examples are not wanting of the application of these principles to the merger of a cause of action for deceit in a judgment for the purchase price.

Thus, in *Caylus* v. *The New York, Kingston & Syracuse Railroad Company,* 76 N. Y., 609, the plain-

tiffs had sold certain iron rails to be used in the construction of the railroad and had received in payment therefor promissory notes of the railroad company and as collateral thereto bonds which were represented to them to be first mortgage bonds of the railroad company. Plaintiffs recovered a judgment upon the notes, which was uncollectible. They thereupon began an action against the railroad company and its directors alleging that they had sold the rails and accepted the notes and bonds upon the representation that the bonds were first mortgage bonds, when, in fact, they were second mortgage bonds and so known to be by the directors. It was held that the action could not be maintained, the court saying:

> "Upon the assumption that a sufficient cause of action for a fraud committed by the directors for which the company would be liable is alleged, there could be no recovery against it for damages in this action on account of such fraud for the reason that the plaintiffs have already a judgment against it for the full amount due them on account of the iron sold the Litchfields. That judgment covers the entire ground and is as complete and full a remedy as any judgment for damages in this case could be. A judgment in this case against the company could not be for any more and would have no greater force. They cannot have two judgments against the company to indemnify themselves for the same loss."

Caylus v. *New York, Kingston & Syracuse Railroad Company,* 76 N. Y., 609, 611, 612.

Bowen v. *Mandeville,* 95 N. Y., 237, cited by the Circuit Court of Appeals, is not in conflict with the

Caylus case. In *Bowen* v. *Mandeville,* the court, while holding the two remedies concurrent, so long as neither had been merged in a judgment covering the entire cause of action, said:

> "A different question would have been presented had the plaintiff first recovered judgment for the entire amount guaranteed to be paid by the defendant, and had then sought to maintain this action. As such a judgment would have covered the entire damage that could be occasioned by the transaction in question, it would necessarily include both the damages inflicted by the fraud as well as those resulting from the breach of contract."
>
> *Bowen* v. *Mandeville,* 95 N. Y., 237, 241.

In *Morgan* v. *Skidmore,* 3 Abb. N. Cas. (N. Y.), 92, after judgment had been obtained against a surviving partner for money loaned to the firm, an action was brought against the executor of a deceased copartner to recover damages for false representations made by the deceased concerning the solvency of the firm. Although the former judgment for the debt against the one partner was held to be no bar to the action for deceit against the other, the general principle applicable in cases where the parties to both actions are the same, was conceded by the court. In this connection Mr. Justice Rapallo said:

> "On the argument this case was assimilated to that of a debt contracted by a party on his own individual behalf, by means of fraudulent representations made by him as to his own solvency.
>
> It is claimed that in such a case, the creditor has a right to sue in tort to recover damages for the fraud, or on contract to recover the debt;

that he may pursue either of these remedies, but not both; and that a judgment in either form of action is a bar to the other; that all claims and causes of action, arising out of the transaction, are merged in such a judgment.

Such would undoubtedly be the result, where various contract obligations were given by the same individual for the same debt, provided they were all his own individual and several obligations. They would necessarily all merge in the higher security of a judgment recovered on either one of them. And it may well be, that the same principle would apply in a case of fraud, where the party liable for the fraud, was the sole party responsible on the contract induced by the fraud; and that, in such a case, all liability for the fraud would be merged in a judgment on the contract.

But the present case is clearly to be distinguished from one where the judgment set up as a bar is founded upon the several contract of the defendant in the action for the fraud, and is against him alone; and by considering this distinction, much confusion will be avoided."

Morgan v. *Skidmore*, 3 Abb. N. Cas. (N. Y.), 92, 102.

In the case at bar there is no such distinction as is pointed out in the Bowen case or in the Morgan case. A judgment has been obtained, and both causes of action are against the same parties, against all the members of the firm of Friend, Moss & Morris.

In Illinois the distinction which we have attempted to point out between election of remedies on the one hand and the merger by judgment of causes of action, even where they are consistent, has been noticed by

Judge McAllister in the leading case of *Brumbach* v. *Flower*, 20 Ill. App., 219, in which it was said:

> "If the action in assumpsit had gone to judgment, it would probably have been a bar to the action for the fraud. But having been discontinued, it was no waiver of the tort."
>
> *Brumbach* v. *Flower*, 20 Ill. App., 219, 222.

It thus appears that even those courts which hold that an action for deceit is consistent with an action for the purchase price—contrary to the rule as announced by this court in *Adler* v. *Fenton*, and *Lincoln* v. *Claflin, supra*—nevertheless also hold that a judgment for the purchase price against the party liable for the deceit, even without satisfaction, bars any further action for the deceit.

An order of a court of bankruptcy, or of a court of probate, allowing a claim, is clearly a judgment.

> *Kuehling* v. *Leberman*, 2 Wkly N. C. (Pa.), 616.
>
> *Mitchell* v. *Mayo*, 16 Ill., 83, 84.
>
> *Wheeler* v. *Dawson*, 63 Ill., 54.

The effect of the allowance of Talcott's claim in bankruptcy was therefore to merge in the order of allowance all his causes of action growing out of the sale to Friend, Moss & Morris. That the judgment of allowance may not be as valuable to the claimant as a judgment for the deceit cannot change its legal effect as a merger of the cause of action.

In *Karr* v. *Barstow*, 24 Ill., 580, 582, it was urged that a judgment in replevin would not operate as a merger of plaintiff's cause of action for the trespass in taking the goods, because the plaintiff not being

able to recover punitive damages in replevin, the judgment therein did not give him complete relief. But the court said:

> "The proposition will not bear argument. If he selected the form of action in which he was not entitled to recover vindictive damages, he must be content with the remedy which that form of action has afforded him."

Moreover, since this court has decided in *Tindle* v. *Birkett* that a claim for fraudulent representations is provable, it must follow that if such a claim is not merged in the order of allowance of a claim for the purchase price, a defrauded vendor may file two distinct claims and receive dividends upon both, provided the aggregate dividends paid do not exceed his claim.

In both voluntary and involuntary bankruptcy, it has been said, "undoubtedly the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors."

Wilson v. *City Bank*, 17 Wall., 473, 480.

The decision of the Circuit Court of Appeals tends directly to defeat both these objects. It involves as a corollary the right to file a double claim, thus preventing a just distribution. It leads to the result, in the case at bar, of denying to petitioners the benefits of a discharge. If the Bankruptcy Act, expressly or by implication, provided that the allowance of a claim for goods sold should not affect a claim for fraud, an argument based on the general purposes of the Act would perhaps be entitled to little weight.

The conclusion of the Circuit Court of Appeals, however, is not deduced from the Bankruptcy Act, but from a proposition—unsound as we contend, disputable at best—of general law that the two remedies are consistent. The soundness of a conclusion so drawn may well be deemed doubtful, when the conflict between it and the conceded purposes of bankruptcy legislation is observed.

III.

Not only did respondent elect a cause of action in contract and waive an action for fraud, not only did he elect a judgment allowing his claim in preference to a judgment for the fraud, but he made a further election.

By appearing in the bankruptcy proceedings and opposing petitioner's discharge, he elected in the most solemn form, to treat his debt as one not excepted from the operation of a discharge; he elected the bankruptcy court as the forum in which the effect of the alleged false statement upon his right of action should be determined.

If, as respondent now contends, his rights could not be affected by a discharge, if his debt was not dischargeable, what interest had he in opposing a discharge? By Section 14 b of the Bankruptcy Act, the judge is directed to "hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest."

By filing objections, respondent declared himself to be a party in interest, and called upon the bank-

rupts to litigate with him the question of their right to a discharge. If his debt was not dischargeable, if he had the same action against them whether the discharge was granted or refused, he was not a party in interest.

The bankrupts accepted his declaration that he was interested, acquiesced in his claim that he was entitled to be heard, took up his challenge, employed counsel to represent them, submitted themselves to examination, and in good faith litigated in the court to which respondent had submitted the case, their right to be discharged of their liability to him.

In short, respondent made a fourfold election. He elected his right: a claim for the purchase price in preference to an action for deceit. He elected his remedy: a judgment of allowance of his claim in preference to a judgment for fraud. He elected his defense to petitioners' application for discharge: opposition to the discharge in preference to suit after discharge. He elected his forum: the court of bankruptcy.

That court, having, as in duty bound, investigated the merits of the application for composition, found that the "bankrupts had not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge," and entered its decree confirming the composition.

By Section 14b of the Bankruptcy Act, as amended in 1903, it is a bar to a discharge that the bankrupt has

> "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

Our contention therefore is that the finding of the District Court that the bankrupts had not been guilty of any of the acts which would be a bar to a discharge, was a finding that they had not been guilty of obtaining property on credit upon a materially false statement in writing. Inasmuch as respondent's suit could be maintained only upon the hypothesis that petitioners had obtained property from him on credit upon a materially false statement in writing, the finding of the District Court was fatal to his right of action.

IV.

With respect to the express finding of the bankruptcy court that "the bankrupts have not been guilty of any of the acts which would be a bar to a discharge" the Circuit Court of Appeals said:

> "Reading the above quoted part of the decree in the light of the prior proceedings which show that the court held, as a matter of law, that the specification was insufficient, and that no evidence was introduced, the meaning of the finding is 'that the bankrupts have not been shown to have been guilty of any of the acts or omissions which would be a bar to a discharge.'" (Rec., 61.)

Surely the ancient maxim "*de non apparentibus et non existentibus eadem est ratio*" is a sufficient answer to this distinction. Our law knows no difference between "not guilty" and "not proven."

The District Court, when it sustained the referee's report and opinion that a false statement, to bar a discharge, must be made directly to the creditor,

and that such a statement made to a mercantile agency, was not within the law, probably committed error. At any rate, later decisions take the opposite view.

In re Dresser, 146 Fed. Rep., 383.
In re Pincus, 147 Fed. Rep., 621.
In re Carton, 148 Fed. Rep., 63.
In re Kyte, 174 Fed. Rep., 867.

If the decision was erroneous, respondent had the right to appeal therefrom. In fact, he gave notice of an appeal and had the court fix the amount of the appeal bond, but never perfected such appeal. (Rec., 38.)

The case of *Talcott* v. *Friend,* 134 Fed. Rep., 778, and 197 U. S., 620, indicates that respondent's failure to perfect his appeal can not be construed as an acquiescence in the decision of the District Court or as giving rise to an estoppel.

Whether based on correct or incorrect views of the law, the decree of the District Court confirming the composition and embodying the finding "that the bankrupts have not been guilty of any of the acts which would be a bar to a discharge," stands unreversed.

That the force and effect of such decree are not qualified because of any erroneous assumptions underlying it, is a doctrine to which this court stands committed. It was said by Mr. Justice White in *Gunter* v. *Atlantic Coast Line,* 200 U. S., 273, 290:

> "The complaint in the Pegues case, it is said, mistakenly averred that the Cheraw and Darlington Railroad had not been built at the time

the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the Attorney General it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. *United States* v. *California & Oregon Land Co.*, 192 U. S., 355; *Fayerweather* v. *Ritch*, 195 U. S., 276, 300, *et seq.*, and cases cited."

And by Mr. Justice Day in *Deposit Bank* v. *Frankfort*, 191 U. S., 499, 510:

"When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but

> the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, would be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

Even if the District Court's holding, in an interlocutory order, that respondent's objections were insufficient was erroneous, the fact has no bearing upon the question of the actual scope and effect of its final order confirming the composition and embodying an express finding that the bankrupts had not been guilty of any of the acts which would be a bar to a discharge. Accordingly we pay no further attention to the former question.

What the actual scope and effect of such final order was, and its special bearing in this case as an adjudication, will be hereafter discussed.

V.

Under the bankruptcy law, prior to the amendment of February 5, 1903, Talcott's cause of action against Friend, Moss and Morris was a provable debt and would have been barred by a discharge.

Both of these propositions are put beyond controversy by *Crawford* v. *Burke*, 195 U. S., 176, and *Tindle* v. *Birkett*, 205 U. S., 183.

Tindle v. *Birkett*, so far as concerns the nature of the cause of action, is on all fours with the present case. If there has been no change in the law, the judgment in favor of petitioners might properly have been entered by the Circuit Court on their plea of discharge, without reference to any other question.

In 1903 the Bankruptcy Act was amended. No amendment was made in Section 63, defining provable claims. Consequently, even if the amendment may affect the authority of *Tindle* v. *Birkett* in other respects, it is still a binding authority that Talcott's cause of action for deceit, as alleged in his declaration, was a provable claim in bankruptcy.

Nevertheless the Circuit Court of Appeals, without noticing *Crawford* v. *Burke* or *Tindle* v. *Birkett* at all, held that Talcott's claim was not a provable debt. (Rec., 62.)

The changes introduced into the law by the amendments of 1903 may seem, at first glance, to require a revision of *Tindle* v. *Birkett* as to the effect of a discharge. When the amendatory language is carefully analyzed, however, it will appear that, notwithstanding the act of 1903, all right of action, by one whose property has been obtained upon a statement in writing alleged to be false, is foreclosed by a discharge.

Section 14b was amended by adding an additional objection to the discharge of a bankrupt, viz: that he had

"obtained property on credit from any person

upon a materially false statement in writing made to such person, for the purpose of obtaining such property on credit."

No similar objection was provided for by the statute prior to the amendment of 1903.

Section 17 originally provided that a discharge in bankruptcy should release the bankrupt from all of his provable debts, except such as * * * "(2) Are judgments in actions for frauds or obtaining property by false pretenses or false representations."

This sub-clause (2) was amended so that it now reads as follows:

"(2) Are liabilities for obtaining property by false pretenses or false representations."

Thus there are excepted from the operation of a discharge, not merely as before 1903, judgments for obtaining property by false representations, but liabilities for obtaining property by false representations; but by the same statute it is also provided that the obtaining of property on credit upon a materially false statement in writing shall bar the granting of a discharge.

Inasmuch as obtaining property on credit upon a materially false statement in writing made for the purpose of obtaining such property on credit appears to be one mode of obtaining property by false representations, these two provisions of the Amendatory Act of 1903 are to some extent at least in conflict. If no discharge is to be granted to a bankrupt guilty of making a false statement in writing, it seems a work of supererogation to specify the effect of such discharge if granted. It becomes necessary, therefore, in order that all parts of the statute may

receive a reasonable construction, to consider how these two sections may be reconciled. Only two possible constructions, it seems to us; can be suggested.

Congress either intended to grant to a defrauded creditor alternative remedies, or else Section 17 must be understood as if it read "false representations other than the making of a false statement in writing." Under either construction, as we insist, judgment was properly entered by the Circuit Court in favor of the defendant.

By alternative remedies we mean that Congress may have intended that a creditor, who had extended credit in reliance upon a false statement in writing, should have his election either (a) to object to the bankrupt's discharge; or (b) not having objected thereto, to sue for the deceit notwithstanding the discharge. This construction, while possible, implies that a discharge granted in bankruptcy is no evidence of the bankrupt's right thereto.

A further, and, from a practical point of view, more serious objection to such construction is that it would encourage creditors to whom false statements in writing had been made, to conceal the fact, refrain from opposing the discharge, and after it was granted, sue and recover judgment. In this way, the policy of Congress, evidenced by Section 14b, of making available to all creditors the objection that a false statement in writing had been made, would be frustrated. Instead of disclosing the making of the false statement and, by preventing a discharge, keeping alive the bankrupt's liabilities to all his creditors, the one to whom such statement had been made

would permit the discharge to be granted and thus, by relieving the debtor of all his other obligations, assure his own payment.

The other construction which to our minds at least appears more logical in theory, as well as more promotive of the purposes for which bankruptcy laws are instituted, is that the obtaining of property on credit upon a materially false statement in writing was intended by Congress to be an absolute bar to a discharge, while the obtaining of property by false representations, *other than such a statement in writing,* was intended not to prevent the granting of a discharge, but to keep alive, after a discharge, the liability so incurred.

Such a construction imputes to Congress the same policy which has led the legislatures of some states to define as a crime the obtaining of property by false representations in writing, but to relegate to the civil courts the liability for false representations not in writing.

At the conclusion of the opinion of the Circuit Court of Appeals, it is said (Rec., 63):

> "Furthermore, if Section 14b (3) were to be interpolated into Section 17 (2)" [that is if Section 17 (2) is read as referring only to false representations other than the making of a false statement in writing] "Congress would be held to have intended the absurdity that deceivers, despite their discharges, should remain liable for oral deceits although excused from written deceits."

No doubt it would be an absurdity to conclude that Congress intended any such result; but, with all due deference to the learned court, no such con-

clusion follows from the construction suggested. Deceivers, despite their discharges, will remain liable for oral deceits, but they are not excused from written deceits. On the contrary, if they have been guilty of written deceits, and if the judge performs the duty imposed on him by Section 14b of the Bankruptcy Act of investigating the merits of the application for discharge, their discharge will be refused altogether. Hence, the question of whether they will remain liable for written deceits despite their discharges, can only arise on the supposition that the judges of the District Courts will neglect their duties and will grant discharges when not deserved.

It seems but reasonable to hold, therefore, that Congress, by providing that the making of a false statement in writing should prevent a discharge, intended that the matter should be litigated on the application for discharge.

The statutory provisions that it should be a bar to a discharge to make a false statement in writing (Sec. 14b) and that all creditors should have notice of applications for discharge or composition and an opportunity to present objections (Sec. 58) are rendered wholly useless, if creditors, although duly notified to appear, may refrain from objecting and then be in the same position as if they had successfully objected.

The argument is still stronger when, as in the case at bar, the creditor has objected and been heard on his objections. Why give him a right to object if his objections mean nothing, and if whether he objects or does not object, and even if his objections

are overruled, he still has the right to contend, despite the confirming of the composition or the granting of the discharge, that the debtor has made a false statement in writing and should not have been discharged?

When it is further considered that by the express provisions of Section 12 the judge, before confirming a composition, is directed to satisfy himself that "the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge"; that the form of order confirming a composition prescribed by this court (Form No. 62) contains an express finding to the same effect, it seems difficult to believe that Congress or this court intended the judge to conduct such an inquiry and to embody the results thereof in his order, to no purpose whatever.

In a case recently decided by this court it was said:

> "Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based."
>
> *Blutenthal* v. *Jones*, 208 U. S., 64, 66.

Therefore, when a District Judge of the United States has, so plainly that he who runs may read, expressly found that petitioners have not been guilty of obtaining property upon a false statement in writing, his colleague sitting in the Circuit Court ought not, in a subsequent suit, to convict them of committing the very offense of which they have been acquitted by the District Court.

VI.

We have assumed that when Congress disqualified a bankrupt guilty of making a false written statement from receiving a discharge, it intended that the issue whether such statement had been made should be tried on his application for discharge. So doing, we assume merely that Congress intended, first, that discharges should be granted to bankrupts entitled thereto and denied to bankrupts not entitled thereto; and secondly, that the court to which the bankrupt applies for a discharge should decide whether or not he is entitled to it.

If these assumptions are not valid and if Congress really intended that a creditor, to whom a false statement in writing had been made, should have the option, without any risk, either to object to a discharge, or to pay no attention to it, then it might possibly be argued that a creditor who stayed away from the bankruptcy proceedings altogether could meet a plea of discharge by showing that his suit was founded on the obtaining of property by means of a false statement. But such is not the case here.

Respondent did not stay outside the bankruptcy proceedings, but filed objections to the discharge on the very ground of the making of the same false statement which he now alleges for his cause of action. His objections were duly argued and the court found that the bankrupts had not been guilty of any of the acts which would be a bar to a discharge, *i. e.*, had not been guilty of obtaining property upon a false statement in writing.

Yet, notwithstanding this express adjudication, respondent now claims—and the Circuit Court of Appeals allows his claim—that petitioners did in fact obtain property upon such false statement. With all respect for the learned judges of the Circuit Court of Appeals, we must insist that, in so holding, that court failed to give effect to the principle of *res judicata,* of which this court has gone so far as to say:

> "*Res judicata* renders white that which is black and straight that which is crooked. *Facit ex curvo rectum ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."
>
> *Jeter* v. *Hewitt,* 22 How., 352, 364.

VII.

One of the arguments by which the Circuit Court of Appeals attempted to detract from the legal efficacy of the former adjudication was that in the District Court Friend, Moss & Morris appeared in their capacity as contractors and that in the suit at bar they appeared in their capacity as alleged fraud-doers. This proposition finds no support, we submit, in the authorities. There is no precedent for holding that the nature of the liability, as being in tort or in contract, has any bearing on the capacity in which a party is sued. The capacity intended by the rule is personal capacity of the parties and has nothing to do with the nature of the cause of action.

U. S. v. *California & Oregon Land Co.,* 192 U. S., 355, cited *infra,* pp. 49, 50.

The Circuit Court of Appeals also considered that Talcott appeared in a different capacity in the two suits, namely, that in the case at bar he appeared on his own behalf and in the bankruptcy proceeding as a representative of all creditors.

Numerous cases may be found in which it is held that a party not personally appearing in a cause is bound because represented. In fact, the rule goes so far as to hold that one who is not in fact a party, but who actively participates in a suit in the name of another, is as much bound by the judgment as he would be if he had been a party to the record.

Lovejoy v. *Murray,* 3 Wall., 1.

But a party appearing on his own behalf, as well as on behalf of others similarly situated, is not only bound by the judgment himself but has caused those whom he represents to be bound. A person who appears in a suit in both an individual and a representative capacity, is concluded by the judgment in both capacities.

A good illustration of this rule is found in the case of *Corcoran* v. *C. & O. Canal Co.,* 94 U. S., 741. Corcoran was trustee under a deed of trust made by the Canal Company to secure an issue of bonds and owned in his own right a large number of the bonds. He brought suit as a bondholder, on behalf of himself and other bondholders. The Company pleaded in bar a decree in a former suit in which Corcoran had been a party as trustee. The lower court sustained this defense and dismissed the bill. On ap-

peal to this court the decree was affirmed in an opinion by Mr. Justice Miller, who said:

> "It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree.
>
> But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, Assignee,* v. *Stewart, et al.,* 93 U. S., 155, and the authorities there collected."
>
> *Corcoran* v. *Chesapeake & Ohio Canal Company,* 94 U. S., 741, 745.

The decision of the Circuit Court of Appeals is the more surprising in view of the fact that by its decision in *Magnus* v. *Ketcham,* 112 Fed., 752, that court had fully recognized the scope of an adjudication in bankruptcy proceedings, even as against parties who had not actually appeared therein. In that case one of the acts of bankruptcy alleged in the original involuntary petition was that the bankrupt had given a preference to Magnus by confessing judgment in his favor while insolvent. By stipulation the prop-

erty seized under the judgment in favor of Magnus was sold and the proceeds came into the hands of the bankruptcy court. After the insolvent had been adjudged bankrupt, Magnus filed a petition in court, seeking for the return of the proceeds of the judgment sale, and on the hearing on such petition offered evidence to show that the bankrupt was not insolvent at the time such judgment was confessed. The court held that the order of adjudication was conclusive evidence of the giving by the bankrupt of a preference to Magnus while insolvent, saying:

> "It was clearly the privilege, as well as the duty, of appellants, if they wished to dispute the allegation in the petition that the confession of judgment on February 27th was an act of bankruptcy, to appear and controvert the facts so alleged. Not having done so, we think the return of the referee was right, that the judgment was binding upon them. They were not interested in several other acts of bankruptcy alleged, but they were interested in that, and it was their duty, as well as privilege, to defend against it."
>
> *Magnus* v. *Ketcham,* 112 Fed., 752, 758, 759.

In the case cited the Court of Appeals, if it had proceeded along the lines of its opinion in the case at bar, would have held that Magnus was not bound by the adjudication, because, first, in the bankruptcy proceedings he was a party only in his capacity as an alleged fraud-doer, while as petitioner for the funds in court he appeared in the capacity of a claimant of property belonging to him, and second, that in the bankruptcy proceeding the only issue was the right to an adjudication as against all parties in interest.

In its opinion in the case at bar, the Circuit Court of Appeals does not notice the decision in *Magnus* v. *Ketcham,* although specially called to its attention, both in the original brief of petitioners and in the petition for rehearing.

The case at bar makes a stronger appeal for the application of the rule in *Magnus* v. *Ketcham* than that case itself. Magnus did not appear to oppose an adjudication, but the same was entered by default. Talcott, on the other hand, actually appeared in the bankruptcy case, filed his claim and had it allowed, and set up in opposition to the confirmation of the composition the obtaining of his property upon the same alleged false statement which he now alleges as his cause of action.

VIII.

The most serious argument of the Circuit Court of Appeals against the legal efficacy of the former adjudication was that there was no identity of issues, because in the bankruptcy the only issue was the right to a discharge as against all parties in interest.

But there is no substantial difference between that issue and the issue presented for decision to the Circuit Court. The form in which the issue arose was different, but the issue was essentially the same.

That issue was whether Friend, Moss & Morris were entitled to be relieved from further liability to Talcott, or whether Talcott's claim against them should continue as an existing cause of action. No

doubt in the bankruptcy proceedings there was involved not merely the liability of Friend, Moss & Morris to Talcott but also their liability to all their other creditors. But the question of their liability to Talcott was included in the question of their liability to all their creditors. Talcott's interest in the latter question was confined to their liability to him. To say, as the Circuit Court of Appeals did, that the only issue in the bankruptcy proceedings was the right to a discharge as against all parties in interest, is to limit the principle of *res judicata* to matters of mere form.

For convenience of procedure the bankruptcy court, treating all creditors as a class, does not permit the right to a discharge to be litigated between the bankrupt and each creditor separately. In substance, however, the court in passing upon an application for discharge determines the bankrupt's right to be relieved from further liability to each of his creditors.

Talcott appeared in the bankruptcy proceedings and set up that the bankrupts were not entitled to a discharge; that is to say, were not entitled to be relieved of their liability to him, because they had made a certain false statement to Woods Drygoods Commercial Agency. The court decided that the bankrupts were entitled to a discharge; that is to say, that they were entitled to be relieved from their liability to Talcott.

In the suit at bar, notwithstanding this adjudication, Talcott again makes the same claim and asserts the same right, viz.: that by reason of said

statement to Woods Drygoods Commercial Agency, Friend, Moss & Morris are still liable to him.

Tinker v. *Colwell*, 193 U. S., 473, the only decision of this court mentioned in the opinion of the Circuit Court of Appeals (Rec., 62) was a writ of error to review a judgment of a state court denying the application of a discharged bankrupt to cancel and discharge of record a judgment recovered prior to the bankruptcy in an action for criminal conversation.

It appears in the statement of facts that the judgment creditor had opposed the discharge, but neither the elaborate argument of counsel nor the opinion of the court notices the fact. Whether the judgment creditor's appearance in the bankruptcy and the adverse decision of the District Court amounted to a prior adjudication was therefore not considered; and none of the reasons urged by us in this brief would have led to a different decision in the Tinker case.

In *Tinker* v. *Colwell* there was no inconsistency between the different claims put forward by the creditor, and no question such as is here presented, with reference to the proper construction of Sections 14 and 17. But aside from that, the objections to discharge urged by the creditor there did not, as here, involve the assumption that his debt was dischargeable, or submit to the court all his rights. On the contrary, he based his objections, as will be seen by reference to the opinion of the District Court in 99 Fed. Rep., 79, expressly on the proposition that his debt could not be discharged, and that therefore

ace it was the only debt scheduled, the court had no jurisdiction to consider the application for discharge. He did not contest the bankrupt's application on the merits, but the court's jurisdiction to entertain it.

Audubon v. *Shufeldt*, 181 U. S., 575, is another decision which should be noticed. It is not altogether free from difficulty—a difficulty caused, not by anything said in the opinion, but by the nature of the order entered by this court. That order was that

> "the order granting a discharge covering arrears of alimony is reversed, and the case remanded for further proceedings consistent with the opinion of this court."
>
> *Audubon* v. *Shufeldt*, 181 U. S., 575, 580.

The case did not involve the right of Shufeldt to a discharge as against other creditors, but the only point argued by counsel or considered by the court was whether appellant's claim for arrears of alimony was dischargeable. If the Circuit Court of Appeals was right in saying that the only issue on these petitioners' application for discharge was "the right to a discharge as against all parties in interest," then it might be said that this court in *Audubon* v. *Shufeldt* went outside the only issue and confused the distinction between the granting of a discharge and its operation upon particular claims.

We are reluctant to attribute any such confusion of ideas either to the learned justice who wrote the opinion, or to the remainder of the court who concurred therein. We prefer to believe that the court there exercised a proper caution founded upon a

tacit appreciation of the obstruction, which an affirmance of the decree would have presented to another action by appellant. The order entered in effect permitted the lower court to grant a discharge with an express reservation of appellant's other remedies, and was thus in perfect harmony with the policy to which this court has consistently adhered, of specifically directing that the dismissal of a bill shall be without prejudice to an action at law. See *e. g.*,

Scott v. *Neely*, 140 U. S., 106, 117.

In the absence of such a qualification, the dismissal of a bill is presumed to be an adjudication against the right to proceed at law, as stated in a case reported in the same volume as *Audubon* v. *Shufeldt*.

Baker v. *Cummings*, 181 U. S., 117, 125.

If an order granting a discharge, as seems to be held by the Circuit Court of Appeals, has no bearing upon the operation of the discharge, the judgment of this court in *Audubon* v. *Shufeldt* is meaningless—a conclusion which makes us doubt the premise.

The true rule we conceive to be that a creditor who appears in the bankruptcy, not merely, as in *Tinker* v. *Colwell*, to contest the court's jurisdiction, but to oppose the discharge on the merits, thereby commits to the District Court, the fate of his rights against the bankrupt.

The different form in which the question now arises does not affect the force of the former adjudication. The general rule on this subject was clearly an-

nounced by this court in *Southern Pacific Railroad Company* v. *United States,* 168 U. S., 1, where it was said by Mr. Justice Harlan:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."
>
> *Southern Pacific Railroad Company* v. *United States,* 168 U. S., 1, 48, 49.

Even if it could be claimed that the issues in the two proceedings were different and that the cause of action was not the same, yet, as the case cited holds, even where the second suit is for a different cause of action, a right or question once determined must be taken as conclusively established.

In the bankruptcy proceeding the right of Friend, Moss & Morris to be relieved of further liability to

Talcott and the question as to how far this right was affected by the making of the statement to Woods Dry Goods Commercial Agency were determined. That determination, as said in *Southern Pacific Railroad Company* v. *United States, supra,* must be regarded as conclusively established so long as the judgment confirming the composition remains unmodified.

In another case recently decided by this court, *United States* v. *California & Oregon Land Co.,* 192 U. S., 355, a bill had been filed by the United States to cancel certain land patents, on the ground that the grantees had not complied with the conditions upon which the issue of the patents was authorized. The bill was dismissed. Subsequently the Government filed a new bill, as trustee for certain Indians, claiming that part of the lands were within the limits of an Indian Reservation, and therefore not subject to patent. It was argued that the former decision was no bar because the Government was now suing in a different capacity, but this court held the contrary, saying, in an opinion by Mr. Justice Holmes:

> "On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute would be a bar. The parties, the subject matter and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. It would be true of a suit by an executor as compared with a suit by the same person on his own be-

half. But that is because in theory of law the executor continues the *persona* of the testator, and therefore is a different person from the natural man who fills the office. This is recognized in *Leggott* v. *Great Northern Ry.*, 1 Q. B. D., 599, 606, cited for the United States. Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. See *Werlein* v. *New Orleans,* 177 U. S., 390, 400, 401. The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."

United States v. *California & Oregon Land Co.,* 192 U. S., 355, 357, 358.

The case last cited is directly applicable to the suit at bar. The real relief sought by Talcott is the same in both cases. His asserted right in both the District Court and the Circuit Court was the same, namely, the preservation of his claim as a subsisting cause of action, notwithstanding the bankruptcy. He sought to establish this right by different means in the two courts. In one court he attempted to attain his object by a judicial declaration that these petitioners were not entitled to a discharge; in the other court, by a judicial declaration that the discharge did not affect his particular claim. In both proceedings his ultimate object was the enforcement of the same right.

A similar situation to that in *United States* v. *California & Oregon Land Co.*, and one perhaps even more analogous to conditions at bar—was presented in *Northern Pacific Railway Company* v. *Slaght*, 205 U. S., 122.

In that case, Slaght, claiming under a homestead patent issued in 1897, brought ejectment against the railway. It defended, asserting a right of way under an act of Congress of March 3, 1875, and also a title by limitation. To meet these defenses, Slaght offered in evidence a judgment in his favor in a prior suit brought against him by the predecessor in interest of the railway. The object of the prior suit was to have Slaght declared a trustee, holding the land for the plaintiffs, to enjoin him from bringing any action against them, and to quiet their title. The ground of the prior suit was that the land was not subject to patent or to settlement or entry, except under the act of 1864 granting land to the Northern Pacific Railroad Company and plaintiffs claimed under a grant from that company. Slaght demurred to the complaint, his demurrer was sustained and judgment entered in his favor and the judgment so entered was set up by him as *res adjudicata* in the ejectment suit.

The lower courts sustained his claim and entered judgment in his favor. In affirming that judgment, this court, by Mr. Justice McKenna, said:

> "The effect of the decree, it is insisted, was only to decide against the title specially set forth in the pleading and further, 'in this action [that at bar] the right asserted is a perpetual easement or way, by virtue of the act of 1875, through the lands involved in the former suit.

Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved.' To sustain these conclusions the following authorities are cited: *Wiggins Ferry Company* v. *Ohio & Mississippi Company,* 142 U. S., 396, 410; *Gilman* v. *Reives,* 10 Pet., 297; Freeman on Judgments (4th Ed.), Sec. 267; Van Fleet, Form. Ad., Sec. 306, and following.

The citations are not apposite to the present controversy. It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould* v. *Evansville & Crawfordsville R. R. Co.,* 91 U. S., 526; *Bissel* v. *Spring Valley Township,* 124 U. S., 228; Freeman on Judgments, section 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated. There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand. *Cromwell* v. *County of Sac,* 94 U. S., 351; *Bissel* v. *Spring Valley Township,* 124 U. S., 225; *New Orleans* v. *Citizens Bank,* 167 U. S., 371; *Southern Pacific Railroad Company* v. *United States,* 168 U. S., 1; *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273; *Deposit Bank* v. *Frankfort,* 191 U. S., 499; and a distinction between personal actions and real actions is useful to observe. Herman on Estoppel, Sec. 92. It is there said: 'Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the de-

fendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.' "

Northern Pacific Railway Company v. *Slaght,* 205 U. S., 122, 130, 131.

To contend that the District Court adjudicated only that a false statement to a mercantile agency would not bar a discharge, or only that the composition should be confirmed, is equivalent to the contention in the Slaght case that the former judgment did not adjudicate upon the right to an easement but only upon a title in fee. Indeed, the Circuit Court of Appeals, if it applied its theory to the Slaght case, would logically hold that Slaght's former judgment amounted only to an adjudication that the company was not entitled to an injunction against him. The opinion of the Circuit Court of Appeals in the last analysis, really comes to this, that the District Court merely adjudicated that an order be entered confirming the composition. This, consistently applied, would reduce the evidential force of a judgment to mere proof of its own existence.

The doctrine of *res judicata,* however, is not concerned with particular remedies, but, as said by Mr. Justice Day in *Deposit Bank* v. *Frankfort, supra:*

"Is founded upon the proposition that all con-

> troversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties."
>
> *Deposit Bank* v. *Frankfort*, 191 U. S., 499, 510.

The decree of the District Court embodied such a settlement of the rights of the parties. Just as in the Slaght case the former judgment denied for all time to the railway and its privies, any right, however derived, to retain the property; so the judgment of the District Court denied for all time to Talcott any right, however derived, to retain his claim against petitioners.

Within the true meaning of the distinction pointed out by Mr. Justice McKenna in the Slaght case, between real and personal actions, the bankruptcy proceeding was a real action. The hearing on the composition involved not mere claims, but rights of property—not, it is true, rights of property in land or chattels, but the right of property of the several creditors of petitioners in their several obligations. The creditors who opposed the discharge were not seeking to enforce their obligations as such; if the court had refused a discharge, it could not have awarded execution for the amount of their debts. What each of them sought was the preservation of his right of property in the obligation, the *vinculum juris* itself. By confirming the composition, the District Court denied the right of property so asserted by Talcott and the other creditors who opposed the composition, extin-

guished their title, and confirmed to petitioners a perpetual bar to such title.

To sum up the whole matter in a few words: *Interest rei publicae ut sit finis litium.* Talcott had his day in court. He submitted his rights to his chosen forum. He must abide the result.

Respectfuly submitted,

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER,
ARTHUR B. SCHAFFNER,
Counsel for Petitioners.

FILED.
NOV 12 1910
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. [redacted] 155.

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

REPLY BRIEF FOR PETITIONERS.

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER,
ARTHUR B. SCHAFFNER,
Counsel for Petitioners.

GUETHOEF-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 748

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

REPLY BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

In their statement of facts counsel for respondent announce that they will present "some facts already stated by counsel for petitioners, and some, though quite material, that were not stated by them." (Brief, p. 2.)

Accordingly we have carefully read over their statement in order to discover these material facts not stated by us. The only ones noted by counsel which were not covered by our statement are the following:

A. That only the copartnership of Friend, Moss & Morris was adjudicated a bankrupt, but the individual members thereof were not so adjudicated.

B. The precise allegations of the petition for confirmation of composition which was filed by petitioners in the bankruptcy proceeding.

C. That the declaration of respondent in the case at bar contains four counts, of which the fourth does not mention any written financial statement, but alleges a false statement without averring whether it was in writing or not.

I.

Of course it is true that the adjudication was of the partnership of Friend, Moss & Morris, but the contention of counsel that the present proceeding is against the members of the firm individually and hence that a partnership discharge does not affect his claim, is wholly without merit.

We need not argue the question whether a discharge of the partnership does or does not release the individual members thereof, because the case at bar is not in any sense a suit against the partners individually, but is a suit against them as partners. The declaration (Rec., 4) alleges that they were engaged in business under the firm name and style of Friend, Moss & Morris, that the statement was made with reference to the financial condition of the firm, that the goods were sold to the firm, and that the defendants had failed to pay for the goods so sold.

There is no way known to the law of Illinois, or to the common law, of suing a partnership except by making the individual members of the firm defendants. Except by statute a firm cannot be sued as such, and there is no such statute in Illinois.

Moreover, it is only by virtue of the implied agency arising from the partnership relation that all the defendants could in any event be liable to plaintiff. As individuals, only the particular partner who signed the false statement could be liable.

II.

On page 6 of their brief counsel say that the fourth count of the declaration does not mention any written statement to Woods Commercial Agency, but alleges a false statement without stating whether it was in writing or not. They overlook the fact, however, that the plea upon which the case went to trial alleges

> "That the several supposed causes of action in the said declaration and in the several counts thereof mentioned, are one and the same cause of action, and not other or different causes of action, to-wit: the supposed cause of action in the first count of said declaration alleged." (Rec., 16.)

None of the replications deny this allegation of the plea. Consequently the case really involved only the first count of the declaration, in which a written statement to Woods Dry Goods Commercial Agency was alleged.

III.

Respondent's claim that the only issue before the Circuit Court was that of *res judicata,* while not strictly accurate, is substantially true. In addition to his two replications traversing the former adjudication, he also filed a replication of *nul tiel record.* No attempt to prove *nul tiel record* was made, so that practically the only issue was that of *res judicata.*

As the case was an action at law, all material allegations in the plea not dened were admitted. Although not put in issue because admitted, the filing of a claim in bankruptcy by respondent was averred in the plea and could therefore properly be used by the court as the source of a conclusion of law. Similarly, the plea averred the confirming of the composition; the replication did not deny it, and the legal effect of such composition was therefore a proper subject for judicial consideration.

The contention of counsel for respondent on pages 30 and 31 of their brief, that there was no occasion for passing upon either the question of waiver or the question of discharge, is thus entirely fallacious, and hardly respectful to the Circuit Court of Appeals, which devoted two-thirds of its opinion to those matters.

The position of counsel upon this point and their argument on pages 22 *et seq.* of their brief that a judgment is conclusive only of the facts specifically put in issue, illustrate their misconception of the

scope of an adjudication. As stated by Mr. Justice Harlan in *Southern Pacific Railroad Company* v. *United States,* 168 U. S., 1, 48:

> "Even if the second suit is for a diffreent cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The force of a judgment is not limited to the specific facts put in issue, but to every right, question or fact determined. The failure of counsel for respondent to recognize this is perhaps to be explained by the fact that they have not sufficiently considered the decisions of this court, and have preferred to cite cases taken at random from state reports and the Federal Reporter.

Indeed, in view of counsel's admission, on page 16 of their brief that the decisions by this court on the question of *res judicata* are "harmonious and complete," it is surprising how sparingly they make use of them. Only three such decisions are cited and none later than the 119th U. S. No attempt is made to distinguish the numerous recent opinions of this court cited in our original brief; all are passed over in absolute silence.

Instead, counsel present an extremely technical discussion of the difference between the two question-begging categories of "estoppel by judgment" and "estoppel by verdict." It was doubtless with reference to a similar argument that Justice Brewer once said:

> "The whole philosophy of the doctrine of *res*

> *adjudicata* is summed up in the simple statement that a matter once decided is finally decided; and all the learning that has been bestowed and all the rules that have been laid down, have been for the purpose of enforcing that one proposition."
>
> *Smith* v. *Auld*, 31 Kan., 262, 266.

On page 29 of respondent's brief, it is said:

> "Where a demurrer is sustained, there is no adjudication of any fact."

But there is an adjudication of a right, and as said by this court in *Northern Pacific Railway Company* v. *Slaght*, 205 U. S., 122, 130:

> "It is well established that a judgment on demurrer, is as conclusive as one rendered upon proof."

IV.

The silence of respondent's brief with respect to the opinions of this court cited by us on the question of *res judicata*, is almost equalled by its silence with respect to the cases cited by us on the question of waiver. The only one of those cases noticed by counsel for respondent is *Crawford* v. *Burke*, 195 U. S., 176 (erroneously cited as 193 U. S., 176). This case they refer to merely as holding that respondent's claim was provable in bankruptcy,—a proposition which we have never denied and which in fact was one of the foundations of the argument of our original brief.

The only other decision of this court cited by counsel in this connection is *Strang* v. *Bradner*, 114 U. S., 555. Examination of that case shows that it is not

apposite to the present controversy either upon the facts or upon the law. In *Strang* v. *Bradner* it was said:

> "It is contended, however that as Strang & Holland Bros. were under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have made a claim against the estates of the several bankrupts, for such amounts as they were compelled to pay on account of their being accommodation makers and indorsers; consequently, it is argued, the defendants are released by their respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. While the plaintiffs might have based their claim entirely upon the legal obligation of defendants to take up the notes at their respective maturities, they were not bound to waive their right to proceed against the defendants for damages on account of fraud in procuring their execution. This action is brought to recover damages for the deceit practiced upon the plaintiffs. The claim here asserted is not one from which the bankrupts are protected by their discharges; for it is not a claim provable against their estates in bankruptcy. Rev. Stat., Secs. 5067-5072, inclusive, 5117, 5119. 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practiced upon them and made a claim against the estate of the bankrupts based wholly upon their legal obligation to save plaintiffs harmless on account of their being the makers and indorsers of the notes in question, or if the present action had been based upon that obligation, and not upon the fraud committed by defendants, it would not follow that the defendants would be protected by their discharges in bankruptcy;

> for, the statute expressly declares that a discharge is subject, even in respect of claims provable in bankruptcy, to the limitation that no *debt created by the fraud* of the bankrupt shall be discharged by the proceedings in bankruptcy, and that *a debt so created* may be proved, and the dividend thereon shall be a payment *on account of such debt.* Rev. Stat., Secs. 5117, 5119. It is, therefore, clear that whether the claim asserted by plaintiffs is regarded as one arising out of the deceit or fraud of the defendants, or as a debt created by their fraud, the discharges in bankruptcy do not constitute a defense."
>
> *Strang* v. *Bradner,* 114 U. S., 555, 560, 561.

It will be noticed that in *Strang* v. *Bradner,* the creditor, although he could have filed a claim against the estate of the bankrupts, had not done so. The language cited above from the opinion of the court shows that if he had filed a claim based upon the contractual obligation of the bankrupts, it would have been a waiver of any claim against them for damages for fraud.

Furthermore, there is a striking difference between the language of the former bankruptcy statute referred to in *Strang* v. *Bradner* and the present act. Under the old act *debts created by fraud* were excepted from the operation of a discharge. Under the present act it is liabilities for obtaining property by fraudulent representations which are excepted from the operation of a discharge.

Under the act of 1867, as under the present act, the action upon the contract is inconsistent with the action for fraud. But under the former act, an action might have been maintained upon the contract,

and if the indebtedness had been created by fraud, the discharge would have been no bar.

Under the present bankruptcy act, however, the creditor must elect whether he will "waive the tort, and take his place with the other creditors of the estate."

Crawford v. *Burke*, 195 U. S., 176, 187.

Respondent made this election and took his place with the other creditors, but now seeks to revoke his election and change his place.

In *Northern Pacific Railway Company* v. *Slaght*, 205 U. S., 122, 133, this court said, with reference to a similar attempt by the railway to change its position:

> "It elected between those rights and rights under the Powers deed, and we think its grantee is now bound by that election."

Respectfully submitted,

JACOB NEWMAN,
S. O. LEVINSON,
BENJAMIN V. BECKER,
ARTHUR B. SCHAFFNER,
Counsel for petitioners.

Office Supreme Court, U. S.
FILED.
NOV 12 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. [redacted] 155.

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

HORACE KENT TENNEY,
ROGER SHERMAN,
Counsel for Respondent.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

No. 748

HENRY FRIEND, SOLOMON C. MOSS AND HENRY MORRIS,

Petitioners,

vs.

JAMES TALCOTT,

Respondent.

STATEMENT OF CASE.

MAY IT PLEASE THE COURT:

In answering petitioners' contentions we shall endeavor to establish the following propositions:

I.

THIS CASE DOES NOT FALL WITHIN THE CLASS OF CASES IN WHICH THIS COURT IS ACCUSTOMED TO OR WILL ISSUE A WRIT OF CERTIORARI.

II.

THE ONLY ISSUE BEFORE THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS WAS THAT OF RES ADJUDICATA.

III.

THE LAW RELATING TO THE PRINCIPLES OF RES ADJUDICATA IS WELL ESTABLISHED BY THE DECISIONS OF THIS COURT. THERE IS NO CONFLICT AMONG SUCH DECISIONS, AND NO NECESSITY FOR FURTHER CONSIDERATION OF THE PRINCIPLES INVOLVED.

IV.

THE ISSUE OF FORMER ADJUDICATION WAS PROPERLY DETERMINED BY THE CIRCUIT COURT OF APPEALS.

V.

RESPONDENT'S CLAIM IS NOT BARRED BY FILING A CLAIM IN THE BANKRUPTCY COURT NOR DISCHARGED BY THE CONFIRMATION OF COMPOSITION.

Before entering into a discussion of these points we will make a brief preliminary statement of the material facts. In this statement we shall present some facts already stated by counsel for petitioners, and some, though quite material, that were not stated by them.

This is an action on the case for deceit, brought in the Circuit Court of the United States, for the Northern District of Illinois. The respondent here was the plaintiff and the petitioners here the defendants in the trial court. The declaration alleges in substance that the defendants, Friend, Moss and Morris, obtained goods from the plaintiff by false representations as to their financial stand-

ing, resources and credit. By means of the deceit so practiced, plaintiff was damaged.

Defendants in the trial court filed various pleas, among which was a plea of former adjudication, alleging in substance that they had been adjudged bankrupts in certain proceedings in the District Court for the Northern District of Illinois, that plaintiff had filed his claim and his objections to the composition offered by the bankrupts, and that by the confirmation of that composition all the plaintiff's rights had been adjudicated in that court. It was this issue upon the plea of *res adjudicata, and this issue alone,* that was tried in the Circuit Court.

This being so, the facts material to the present inquiry are contained in the record in the bankruptcy proceedings and incorporated in the record herein. Those records show the following:

Subsequent to the time of making the false statements alleged in the declaration herein the copartnership of Friend, Moss & Morris was adjudicated a bankrupt, but the individual members thereof in their individual capacity were not so adjudicated. (Rec., 32, 40.) In their capacity of copartners they filed an application in the United States District Court for a confirmation of a composition with their creditors. In it they alleged only the facts the law required them to allege. (Bankruptcy Act, Sec. 12 a and b) *i. e.:* (1) That they offered terms of composition to their creditors after they had been examined in open court and after they had filed a schedule of their property and a list of their creditors; (2) that the terms of the composition had

been accepted in writing by a majority in number and amount of the creditors whose claims had been allowed; (3) That they deposited in a designated depository the money and notes necessary to pay the composition figure on all claims allowed and also $30,000 to pay debts having priority and costs of the bankruptcy proceedings. (Rec., 32-3.) No other facts were alleged in the application for confirmation of their composition.

The Bankruptcy Act provides that "the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a *bar to his discharge;* and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises or acts herein forbidden. (Sec. 12d.)

It further provides a method by which creditors may oppose and *bar his discharge,* saying:

> "The judge shall hear the application for a discharge (confirmation of composition in this case) and such *proofs and pleas as may be made in opposition thereto* by parties in interest, and discharge the applicant unless he has ((1) and (2) things not essential to this case) (3) obtained property on credit from any person on a materially false statement in writing made to such person for the purpose of obtaining such property on credit. (Sec., 14b (3))."

James Talcott, respondent here, opposed the confirmation of the composition. He pleaded that the bankrupts had procured property on credit from him on a materially false statement in writing on

which he relied, made (not to him, but) to the Woods Commercial Agency. (Rec., 35.) He sought thus, under the practice outlined by the Bankruptcy Act, to have the court enjoin the copartnership from procuring a confirmation of its composition and thus to bar its discharge. In Talcott's plea in opposition to the confirmation (called specifications of objections in this court's General Order No. XXXII and Official Form No. 58), he raised an issue for the first time as to the alleged false statement in writing. No allegation denying the execution of that false statement had appeared in the application for the confirmation of the composition. It was thus brought into the bankruptcy case for the first time.

The matter of the confirmation, including the plea in opposition thereto, was then referred to a Special Master (Rec., 33-4) to take proofs and report his conclusions and recommendations. The Special Master refused to permit Talcott to introduce evidence in support of his specification of objections, holding that it was insufficient *as a mater of law* (Rec., 36-7, 39), saying:

> "It is also contended that specification numbered 8, filed on behalf of James Talcott, was not sufficient, if true, to prevent the confirmation of the composition, because the statement charged was alleged to have been made to a commercial agency and not such false statement in writing made to the objecting creditor directly for the purpose of obtaining such property on credit.
>
> As to specification No. 8 of James Talcott referred to, I am of the opinion that a reasonable and proper construction of Section 14b (3) would require the 'materially false statement in

writing' to be made directly to the creditor in question, and I deem the allegations in this specification, which are to the effect that the alleged false statement was made to a commercial agency, to be insufficient, and I am of the opinion that the specification should be overruled for this reason." (Rec., 26, 39.)

The master recommended the confirmation of the composition, and the District Court confirmed it, finding in the order that the *bankrupt* had complied with the requirements of the act so as to be entitled to a confirmation, and also "that the *bankrupt* (reading in the singular, thus referring to the partnership entity,) has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge." (Rec., 37-8.) No other finding affecting the question at issue was made.

It is these proceedings that are relied upon by petitioners as constituting an adjudication of Talcott's cause of action for deceit, for obtaining goods on false representation.

In this connection it is of importance to note that the action for deceit is pleaded in four counts, three of which are based upon an alleged written statement, but the other, (called "Talcott's second additional count"), does not mention any written statement to Woods Commercial Agency or to any one else, but is based on a false financial statement and representation (not alleged to be in writing) made direct to Talcott. (Rec., 13.)

It thus appears from the record in the Bankruptcy Court that the only thing found by that court with

reference to the alleged false statement was to rule that, as a matter of law, such a statement, made as it was alleged to be, *in writing* and to a commercial agency and not directly to Talcott, was not a ground for refusing to confirm the composition and thus bar a discharge. There was no evidence introduced before the master or in court on which the court could or did find whether a statement was made, whether it was in writing, whether it was made to Talcott directly or indirectly, what it contained or whether its contents were true or false.

The trial court in the case at bar held that Talcott's action for deceit had been adjudicated against him *in the confirmation proceedings;* the Circuit Court of Appeals took a contrary view, holding that no adjudication occurred in the confirmation proceedings and that Talcott could still maintain this action for deceit. The Circuit Court of Appeals remanded the case to the trial court for further proceedings.

BRIEF OF ARGUMENT.

I.

THIS CASE DOES NOT FALL WITHIN THE CLASS OF CASES IN WHICH THIS COURT IS ACCUSTOMED TO OR WILL ISSUE A WRIT OF CERTIORARI.

Fields v. *U. S.*, 205 U. S., 292.
In re Woods, 143 U. S., 202.
Lau Ow Bew, 141 U. S., 583; 144 U. S., 47.
Forsyth v. *Hammond*, 166 U. S., 506.
American Construction Co. v. *Jackson R. R. Co.*, 148 U. S., 372.

II.

THE ONLY ISSUE BEFORE THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS WAS THAT OF RES ADJUDICATA.

Record, pages 24 and 31.
Petitioners' petition, p. 7.
Petitioners' brief, p. 3.

III.

THE LAW RELATING TO THE PRINCIPLES OF RES ADJUDICATA IS WELL ESTABLISHED BY THE DECISIONS OF THIS COURT. THERE IS NO CONFLICT AMONG SUCH DECISIONS, AND NO NECESSITY FOR FURTHER CONSIDERATION OF THE PRINCIPLES INVOLVED.

Cromwell v. *County of Sac*, 94 U. S., 351.
Russell v. *Place*, 94 U. S., 606.
Enfield v. *Jordan*, 119 U. S., 680.

IV.

THE ISSUE OF FORMER ADJUDICATION WAS PROPERLY DETERMINATED BY THE CIRCUIT COURT OF APPEALS.

(a) *There was no estoppel by judgment because the two cases are not the same.*

Markley v. *People*, 171 Ill., 260, 262.
Wright v. *Griffey*, 147 Ill., 496, 498.

(b) *There was no estoppel by judgment because there was no identity of parties.*

Record, p. 62.

(c) *There was no estoppel by judgment because the subject matter of the two proceedings is different.*

(d) *There is no estoppel by verdict because that principle does not apply to this case.*

Cromwell v. *County of Sac*, 94 U. S., 351.
Riverside Co. v. *Townshend*, 120 Ill., 9.
Harrison v. *Remington Paper Co.*, 140 Fed. (C. C. A.), 385, 400.
Wright v. *Griffey*, 147 Ill., 496.
Stone v. *Salisbury*, 209 Ill., 56.
Southern Co. v. *St. Paul Co.*, 55 Fed., 690.
Chicago, Burlington & Quincy R. R. Co. v. *Cass County*, 72 Neb., 489, 101 N. W., 11.

(e) *There is no estoppel by verdict because the defendants below did not show what specific facts were passed upon in the District Court. The burden of proof is on him who relies on an estoppel by verdict.*

Russell v. *Place*, 94 U. S., 606.

Harrison v. *Remington Paper Co.*, 140 Fed., (C. C. A.), 385, 400.
Cromwell v. *County of Sac*, 94 U. S., 351.
Southern Co. v. *St. Paul Co.*, 55 Fed., 690.
Enfield v. *Jordan*, 119 U. S., 680, 691.
Theological Seminary v. *People*, 189 Ill., 439.
Hudson v. *Remington Paper Co.*, 71 Kan., 300, 304.

(f) *There was no adjudication of any fact because there was no judgment on the merits of any question.*

23 Cyc., 1149.
Longmuir v. *Landis*, 113 Ill. App., 134, 137.
Wells on Res Adjudicata, p. 8 and p. 177.
Hughes v. *U. S.*, 4 Wall., 232, 237.
Farmers' Assn. v. *Caine*, 224 Ill., 599.
Vanlandingham v. *Ryan*, 17 Ill., 25.

V.

RESPONDENT'S CLAIM IS NOT BARRED BY FILING A CLAIM IN THE BANKRUPTCY COURT NOR DISCHARGED BY THE CONFIRMATION OF COMPOSITION.

WAIVER.

(a) *Talcott's act of proving his claim in the bankruptcy proceeding did not constitute a waiver of his right to sue for deceit.*

Katzenstein v. *Reid, Murdoch & Co.*, 41 Tex. Civ. App., 106, 91 S. W., 360 (1905); 16 Am. B. R., 740, 749.

Standard Sewing Machine Co. v. *Kattell,* 132 App. Div , 539, 22 Am. B. R., 376, 379 (1909).

In re Lewensohn, 99 Fed., 73, 74, affirmed in 104 Fed. (C. C. A.), 1006.

Standard Sewing Machine Co. v. *Alexander,* 68 S. Car., 506 (1904), 47 S. E., 711.

Frey v. *Torrey,* 70 App. Div., 166, 175 N. Y., 501, 67 N. E., 1002.

Maxwell v. *Martin,* 130 App. Div. (N. Y.), 80; 22 Am. B. R., 93, 97.

Strang v. *Bradner,* 114 U. S., 555, 560.

Stokes v. *Mason,* 10 R. I., 261.

McBean v. *Fox,* 1 Ill. App., 177.

Bankruptcy Act, sec. 17a (2).

(b) *Even if Talcott's claim had been reduced to judgment in an action of assumpsit that would not bar this action for deceit.*

Whittier v. *Collins,* 15 R. I., 90, 2 Am. St. R., 879.

Union Central Life Ins. Co. v. *Scheidler,* 130 Ind., 214, 29 N. E., 1071, 15 L. R. A., 89.

Standard Sewing Machine Co. v. *Owings,* 140 N. C., 503; 53 S. E., 345.

Norton v. *Huxley,* 13 Gray (Mass.), 285.

Brumbach v. *Flower,* 20 Ill. App., 219, affirmed in 131 Ill., 646.

Bacon v. *Moody,* 117 Ga., 207, 43 S. E., 482.

Black v. *Miller,* 75 Mich., 323, 42 N. W., 837.

DISCHARGE.

(a) *The confirmation of composition did not discharge Talcott's claim for deceit.*

Bankruptcy Act, Secs. 63a (4) and 17a (2).
Crawford v. *Burke,* 193 U. S., 176, 193.
Mackel v. *Rochester,* 135 Fed., 904, 906.
Nelson v. *Petterson,* 131 Ill. App., 443, 450, affirmed in 229 Ill., 240, 82 N. E., 229.

(b) *The individual members of the partnership were not discharged from their liabilities either individual or partnership, since they were not individually adjudged bankrupt.*

In re Walrath, 24 Am. B. R., 541.
Bankruptcy Act, Sec. 14a.
In re Clisdell, 4 Am. B. R., 95, 101 Fed., 246.
In re Mason, 3 Am. B. R., 399, 99 Fed., 256.
In re Bertenshaw, 157 Fed. (C. C. A.), 363.
In re Pincus, 147 Fed., 621, 17 Am. B. R., 331.
In re Hale, 107 Fed., 432, 6 Am. B. R., 35.
In re Mercur, 116 Fed., 655, 658-9.
Kavanaugh v. *McIntire* 120 App. Div. (N. Y.), 722, 112 N. Y. S., 987.

ARGUMENT.

I.

THIS CASE DOES NOT FALL WITHIN THE CLASS OF CASES IN WHICH THIS COURT IS ACCUSTOMED TO OR WILL ISSUE A WRIT OF CERTIORARI.

In *Fields* v. *U. S.*, 205 U. S., 292 (p. 296), this court has stated the conditions under which a writ of *certiorari* will issue. The rule is there laid down that the questions involved must be:

(1) Questions of gravity and general importance, or

(2) Questions on which there is a conflict between the decision of the State and Federal Courts, or between Federal Courts of different circuits, or

(3) Questions affecting the relations of this nation to foreign nations, or

(4) Questions of general interest to the public.

It is apparent that the case at bar falls within none of these classes.

In the case of *In re Woods*, 143 U. S., 202, we have a case and a contention almost identical with the case at bar and the contention made by counsel here. Lindvall brought suit in the Circuit Court of the United States for the District of Minnesota against Woods to recover for personal injury. The defendant pleaded a former adjudication. The bill of exceptions showed that the defendant relied upon the proceedings in a prior suit Lindvall had brought

against Woods in the District Court of the State of Minnesota, in which the court dismissed the suit on the ground that the plaintiff's evidence did not make out a case.

The defendant insisted that in the interest of jurisprudence and uniformity of decision provision was made under the Circuit Court of Appeals Act for such supervision on the part of this court as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters.

This court denied the petition. It did so upon the ground that the question whether a judgment of dismissal in a former suit was a bar to a second suit upon the same cause of action did not come within the category of questions of such gravity and importance as require a review of the conclusions of the Circuit Court of Appeals with reference thereto.

In *Lau Ow Bew* v. *United States*, 144 U. S., 47, Chief Justice Fuller stated the limitations placed upon the right to procure a review by appeal or error of cases made final by the Circuit Court of Appeals Act. He further stated that a *certiorari* would be granted only where questions of gravity and importance are involved or a review would be advisable in the interest of uniformity of decision.

Counsel for petitioners urge four arguments as a basis for this court's issuing the writ of *certiorari*.

The first is that the Court of Appeals erroneously decided every proposition stated in its opinion. As we shall presently see only one issue was before the court, and only one question of law and that

was correctly decided. That was a question of the application of the law of *res adjudicata*, the principles of which have frequently and uniformly been laid down by this court.

The second reason given is that the conclusions of the Court of Appeals are in conflict with the decisions of this court. Counsel have ingeniously taken certain expressions in the opinion of the lower court, treated them as if they were conclusive of the real issue involved and now urge this court to review the entire record for the purpose of passing upon these collateral and immaterial expressions. It is respectfully suggested that this court has enough questions to pass upon if it confines itself to the points in issue without considering all the questions that ingenious counsel can raise by rambling through the immaterial expressions of the lower courts.

The third reason assigned is that the case involves the basic principles of the law of bankruptcy, of *res adjudicata* and collateral attack and because this court has not previously had an opportunity of passing upon the effect of the Bankruptcy Amendatory Act of February 5, 1903.

As to the opportunity to pass upon the Amended Bankruptcy Act it may be suggested that this court can probably forego that pleasure until some case arises that really involves that act. So far as the "basic" principles of the law of bankruptcy are concerned, they are fairly well established and do not need revision unless to fit counsel's contentions in this case.

It is true that this case does involve the law of

res adjudicata, the decisions on which by this court are harmonious and complete.

The fourth reason for review by this court is stated to be that the case is one of overwhelming importance—not to petitioners alone but to the people at large. It is admitted by petitioners that "the power to grant the writ of certiorari is exercised by this court, * * * only in cases of gravity and importance." (Petitioners' Brief, p. 5.) The argument is then advanced that this is such a case because the Circuit Court of Appeals held it under consideration some months! Surely this is a novel argument. This court is asked to find that the case is one of "gravity and importance" because the lower court did not decide it over night. It might appear to some persons that the Circuit Court of Appeals regarded it of so little consequence that it was put aside for cases of real importance.

So far as permitting the petitioners to escape a just liability is concerned the case is of importance to them to the extent of about $3,000. So far as determining important questions of law is concerned the apparent answer is that only one is involved, *res adjudicata*, and that truly has been *res adjudicata*, almost ever since this court was established.

With the knowledge that no showing of "gravity or importance" has been made counsel proceed to argue that if the questions involved had arisen in other courts this court must have reviewed them. The questions could not possibly have arisen in the bankruptcy court and if the remedy had been pursued in the state court

this court would not have reviewed them because no question arising under the Constitution or the laws of the United States is involved—merely the application of the legal principle of *res adjudicata*.

We submit, therefore, that this is not such a case as should recommend itself to this court for review.

II.

THE ONLY ISSUE BEFORE THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS WAS THAT OF RES ADJUDICATA.

That such is the fact is shown by the record herein, pp. 24 and 31, by petitioners' petition filed herein, p. 7, and by the admissions in petitioners' brief, p. 3, where it is stated as follows:

> "The issue of former adjudication thus raised was tried before the Circuit Court without a jury. The court entered a special finding of facts (Rec., 24) in which he found the facts to be susbstantially as alleged in the pleadings, together with a general finding that there had been a former adjudication, and accordingly rendered judgment in favor of petitioners." (Rec., 30.)

III.

THE LAW RELATING TO THE PRINCIPLES OF RES ADJUDICATA IS WELL ESTABLISHED BY THE DECISIONS OF THIS COURT. THERE IS NO CONFLICT AMONG SUCH DECISIONS AND NO NECESSITY FOR FURTHER CONSIDERATION OF THE PRINCIPLES INVOLVED.

This court has laid down the principles of law applicable to a former adjudication clearly and uniformly in such cases as:

Cromwell v. *County of Sac*, 94 U. S., 351.
Russell v. *Place*, 94 U. S., 606.
Enfield v. *Jordan*, 119 U. S., 680.

The result reached by the Circuit Court of Appeals is in exact harmony with the principles of *res adjudicata* announced in these decisions.

IV.

THE ISSUE OF FORMER ADJUDICATION WAS PROPERLY DETERMINED BY THE CIRCUIT COURT OF APPEALS.

(a) *There was no estoppel by judgment because the two cases are not the same.*

The doctrine of strict *res adjudicata* commonly designated as "estoppel by judgment," to distinguish it from "estoppel by verdict," applies only where the two causes of action are identical and the subject-matter of the two suits is the same. As stated by the court in *Markley* v. *People*, 171 Ill., 260, 262:

"Where the former adjudication is relied

upon as an absolute bar, there must be, as between the two actions, identity of parties, *of subject-matter and cause of action.*"

See, also,

Wright v. *Griffey,* 147 Ill., 496, 498.

The action for deceit is a common law right for the recovery of damages. The action to bar the composition (discharge) is based on a federal statute. The action to bar the confirmation was, and could only have been, instituted in the United States District Court after the application for a confirmation had been made by the bankrupt; the action for deceit was instituted in the United States Circuit Court, and could have been instituted in any court of general jurisdiction. But it could not have been instituted in the United States District Court.

(b) *There was no estoppel by judgment because there was no identity of parties.*

This is clearly pointed out in the opinion of the Circuit Court of Appeals. (Rec., 62.) In addition to what the court there said it is obvious that in the District Court the *partnership* only as an entity was involved. Here, in the action for deceit, the individuals are the parties defendant.

(c) *There was no estoppel by judgment because the subject-matter of the two proceedings is different.*

In the bankruptcy court the subject-matter was the discharge, and involved only *contract* relations between the parties. The object of the petition for confirmation was to affect the contract relations be-

tween the bankrupt and its creditors. Specification No. 8 in opposition to that petition was interposed to prevent this contract relation being affected. In this case it is not sought to interfere with any contractual rights, but it is sought to enforce a *tort* right—to recover from the defendants on a liability in tort for a deceit practiced by them upon Talcott. In one proceeding the subject-matter is contractual rights, in the other the subject-matter is tort rights.

That the subject-matters are different was even conceded by counsel in the Circuit Court of Appeals. They said (Petition for Rehearing, p. 13):

> "The defendants here do not need to invoke the strict doctrine of *res adjudicata* (meaning estoppel by judgment, in all probability). They may safely concede that the subject-matter before the court on the application for a discharge was not identically the same as the subject-matter of the present proceeding * * *; and still the judgment in this case should be in their favor because of the doctrine of 'estoppel by verdict.'?"

It therefore appears that in the cases we are considering, aside from identity of parties, identity of the *causes of action* and *subject-matter* does not exist. Hence the doctrine of estoppel by judgment has no application. It follows that petitioners are relegated to the subdivision of *res adjudicata* known as estoppel by verdict. That doctrine *may* be applicable where the causes of action and subject-matter are different, but, as we shall presently show, it is not applicable to this case.

(d) *There is no estoppel by verdict because that principle does not apply to this case.*

When the two causes of action are different, the only adjudication that can possibly be available is an adjudication of *specific facts actually passed upon in the first cause* and relied upon in the second. This is clearly pointed out in *Riverside Co.* v. *Townshend,* 120 Ill., 9, at p. 18, where the court quotes at length from *Cromwell* v. *County of Sac,* 94 U. S., 351, frequently cited, saying:

> "There is a well-founded distinction laid down in the books between 'the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or cause of action, and its effect as an estoppel in another suit between the same parties upon a *different claim or cause of action.* In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, * * * concluding parties, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel *only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit on a different cause of action, *the inquiry must always be as to the point or question actually litigated or determined in the original action,* not what might have been thus litigated or determined.' "

In *Harrison* v. *Remington Paper Co.*, 140 Fed. (C. C. A.), 385, 400, the court said:

> "Where the second suit is upon a *different cause of action* but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to that point or question which was *actually litigated and determined* in the first action, but it is not conclusive relative to other matters which might have been litigated or decided."

The principle that the decree in the District Court operates as an estoppel only as to those facts which were controverted in that court, upon the determination of which the finding was rendered, is supported by the courts generally. *Wright* v. *Griffey*, 147 Ill., 496; *Stone* v. *Salisbury*, 209 Ill., 56; *Riverside* v. *Townshend*, 120 Ill., 9; *Southern Co.* v. *St. Paul Co.*, 55 Fed., 690.

Applying the principle of the *Cromwell* case above it must be concluded that there was no estoppel by verdict as to any fact that is relied on here, as a foundation of this action of deceit. The issue was presented in the District Court by Talcott in Specification No. 8, but the bankrupt excepted (demurred) to the specification, thus raising an *issue of law*. This issue was determined against Talcott, and the bankrupt's demurrer to Talcott's petition for an injunction against granting a discharge—to have the confirmation of composition withheld—was dismissed because it did not state facts which, under the Bankruptcy Act, were grounds for refusing to confirm the composition. That the facts contained in Specification No. 8 pertaining to the statement in writing are insufficient, as a matter of law, to jus-

tify the court in refusing to confirm the composition, is forever settled. *But that is all that is settled.*

Furthermore, in order that the defendants may succeed in this different cause of action, they must show that the District Court actually determined adversely to Talcott, certain facts essential to his right of recovery in the case at bar. This principle is well stated in *Chicago, Burlington & Quincy, R. R. Co.* v. *Cass County,* 72 Neb., 489, 101 N. W., 11, where the court says:

> "There is substantially no difference of opinion upon the controlling legal principle involved in the litigation, that the result of the litigation depends upon the determination of whether these facts are necessarily settled by that litigation, and the authorities substantially agree that such facts so determined cannot afterwards be controverted by the parties to the former litigation. To determine, then, the question before us it is necessary to ascertain what facts controlling the rights of the parties in the former case were adjudicated, and *how far those facts so ascertained are involved in and necessarily control the decision in this case.*"

In *Harrison* v. *Remington Paper Co.,* 140 Fed. (C. C. A.), 385, 401, the court said:

> "Since that judgment (referring to the first of two proceedings to enforce a stockholder's double liability) *may have been* founded upon an adjudication of an issue in that action which is not presented in this, and the fact is not established that any issue, question, or matter essential to the maintenance of this action was necessarily or actually litigated and decided in the former, the judgment in that action did not render any of the issues in this action *res adjudicata.*"

In *Stokes* v. *Stokes*, 155 N. Y., 581, 592, the court said:

> "A judgment does not operate as an estoppel in a subsequent cause between the parties except as to such *facts* as are *litigated* and *decided*, and which have such relation to the issue that their determination was necessary to the determination of the issue. *House* v. *Lockwood*, 137 N. Y., 259."

Thus it appears that a determination by the District Court of some fact not necessarily involved in this case and not necessarly controlling of Talcott's rights cannot have any effect as an adjudication against him. If it should appear that the District Court decided in favor of the bankrupts on the ground that the statement was not in writing (because it was *partly* oral, or *partly* printed) no adjudication could be relied upon because the finding that the statement was not in writing has no effect upon this case. Again, a finding that it was made to Woods Commercial Agency would not necessarily control the rights of Talcott in this case. The statement may have been made to Woods Agency and thus be insufficient to constitute a basis for denying confirmation, but yet be entirely sufficient to constitute a basis for this action of deceit. A misrepresentation to a third person intending to deceive another is as effectual to give rise to an action in deceit as a direct representation to him. In *Katzenstein* v. *Reid*, 41 Tex. Civ. Ap., 106, 16 A. B. R., 740, the representation was made to a commercial agency and the plaintiff relied upon it. The court permitted a recovery in that case in an action of deceit. In other words, if the defendants did show

some fact was adjudicated, they must further show that that fact is *necessarily controlling in the decision of this case.* Here, however, they have not shown any fact to have been adjudicated or that such fact (if adjudicated) would control the decision in the case at bar.

The ruling of the Special Master was that whether the facts existed or did not exist was immaterial, as they were insufficient, in any event, to constitute a basis for withholding a confirmation of a composition. Having sustained the bankrupt's exception, there was no occasion for any evidence on the question whether the bankrupt made or did not make a statement, whether it was false or true, whether it was material or not; there was no occasion to pass upon any question of fact pertaining to the statement at all. The evidence here fails to show that the facts *upon which Talcott now relies* were either actually or necessarily passed upon, and hence defendants have no standing on their plea of former adjudication.

(e) *There is no estoppel by verdict because the defendants below did not show what specific facts were passed upon in the District Court. The burden of proof is on him who relies on an estoppel by verdict.*

It is essential that the party relying upon an estoppel by verdict show that the facts claimed to have been passed upon were adjudicated in the first proceeding. He has the burden of proof. In *Russell* v. *Place,* 94 U. S., 606, the court said:

"It is undoubtedly settled law that a judg-

ment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as for example if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated and upon which the judgment was rendered—the whole subject-matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

In *Harrison* v. *Remington Paper Co.*, 140 Fed. (C. C. A.), 385, 400, the court said:

> "Where the record is such that there is or may be a material issue, question or matter in the second suit on a different cause of action which *may not have been raised, litigated and decided in the former action,* the judgment therein does not constitute an estoppel from litigating this issue, question or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question or matter in dispute was actually and necessarily litigated and determined in the former suit."

To the same effect are *Cromwell* v. *County of Sac,* 94 U. S., 351; *Southern Co.* v. *St. Paul Co.,* 55 Fed., 690; *Enfield* v. *Jordan,* 119 U. S., 680, at 691; *Theological Seminary* v. *People,* 189 Ill., 439.

So, even if evidence had been offered on Talcott's Specification No. 8, or on an allegation in the bank-

rupt's petition for confirmation, and the court had found as it did "that the bankrupt had not been guilty of any of the acts * * * which would have been a bar to the discharge," it still would be a part of defendants' case in this court to show affirmatively by the record or by extrinsic evidence that the very facts relied on in this case as a basis for deceit were found against Talcott. This, of course, has not been done.

The action in the District Court roughly involved six different questions:

(1) Did the bankrupt make a statement?

(2) Was it materially false?

(3) Was it in writing?

(4) Was it made for the purpose of procuring property on credit from Talcott?

(5) Did it procure property on credit from Talcott?

(6) Was it made to Talcott?

The finding that it was not guilty of any of the acts which would deprive it of a discharge did not necessarily settle any specific one of these six questions. *If any one of these questions were answered in the negative by the District Court, then the bankrupt would be entitled to its discharge.* Who shall say which way any one of these questions was answered?

The substantial issues of the present case as stated in the second additional count of the declaration (Rec., 13) are:

(1) Did the defendants make a representation?

(2) Was it materially false?

(3) Was it made with knowledge of its falsity?

(4) Was it made for the purpose of procuring property on credit from Talcott?

(5) Did they procure property on credit from Talcott?

(We have here followed the pattern set by the Supreme Court of Kansas in *Hudson* v. *Remington Paper Co.*, 71 Kansas, 300, 304.)

The only questions of fact common to both cases are those designated in each instance as the first, second, fourth and fifth.

In order for the defendants to interpose successfully the plea of *res judicata* it is incumbent on them to prove that in the former case one of the five questions last above stated was determined in the negative.

If it appears in this case that the bankruptcy court may have found three and six (of the points first above mentioned) in the negative or *if the defendants fail to prove that the bankruptcy court based its decree on either, one, two, four or five* (of the points first above mentioned) *there is no estoppel in this case.* In other words, if the record leaves it uncertain whether the judgment in the bankruptcy court was based on a fact essential to plaintiff's recovery here or on a fact immaterial here but material in the bankruptcy proceeding, then there is no estoppel because the burden is on the party asserting the estoppel to prove that the essential fact was litigated in the first proceeding. It does appear

that the bankruptcy court may have based its ruling on any one of the six points first above mentioned.

The defendants have not and cannot show that any fact material to the issue in this case was decided in the bankruptcy court. The only thing that was decided, is that Specification No. 8 was insufficient *in law* to justify the District Court in refusing to confirm the composition. That decision still stands but does not affect this case in the least.

(f) *There was no adjudication of any fact because there was no judgment on the merits of any question.*

It is an essential requirement of a conclusive judgment that it should go to the merits of the controversy in hand, and hence must not be based merely upon technical defects in the pleadings. Otherwise it will not bar a subsequent action.

23 Cyc., 1149.
Longmuir v. *Landis,* 113 Ill. App., 134 (137).
Wells on Res Adjudicata, p. 8.
Hughes v. *U. S.,* 4 Wall., 232 (237).

The ruling of the master and the court was equivalent to sustaining a demurrer to the specifications of objections. Where a demurrer is sustained there is no adjudication of any fact.

Farmers' Association v. *Caine,* 224 Ill., 599.
Vanlandingham v. *Ryan,* 17 Ill., 25.

There is no such adjudication as bars a recovery unless it appears that the fact sought to be proved by the record was actually passed upon by the jury

(or court, as the case may be) in finding their verdict in the former suit.

Wells on Res Adjudicata, p. 177, quoting from *Dutton* v. *Woodman*, 9 Cush., 261.

It is apparent that no fact was passed upon in the bankruptcy court, because neither the master's report nor the decree confirming it contained any findings on the facts, but on the contrary show that the master and court refused to even inquire as to the facts. Indeed there could have been no such finding under the master's and the court's rulings that the specifications of objections were insufficient in law.

V.

RESPONDENT'S CLAIM IS NOT BARRED BY FILING A CLAIM IN THE BANKRUPTCY COURT NOR DISCHARGED BY THE CONFIRMATION OF COMPOSITION.

Petitioners argue two propositions in this court that are not reviewable on the record. They are:

(1) Respondent's act of filing his claim in bankruptcy constituted a waiver of his action for deceit.

(2) The order confirming the composition in bankruptcy discharges his claim.

Neither of the above issues was so much as suggested on the trial.

The former has never been pleaded, was not passed upon by the trial court, and has not been mentioned

by petitioners before writing their petition for a writ of *certiorari.*

The latter was pleaded in the court below (Rec., 8, 10) as defendants' second and fourth pleas; the second setting up a discharge and the fourth a confirmation of composition. The lower court sustained respondent's demurrer to both of them. (Rec., 15.) They were not renewed, and no cross-errors were assigned in the Circuit Court of Appeals on the trial court's ruling on the demurrer.

Upon the present state of the record this issue could not have been tried on the facts in the court below, (entirely aside from the fact that the only issue actually tried was that of former adjudication). There was no occasion for passing upon the effect of a discharge in the Circuit Court of Appeals, and it is not a proper basis for the petition in this court.

However, since petitioners have so strenuously urged these points we will briefly answer them under the heads of "Waiver" and "Discharge."

WAIVER.

(a) *Talcott's act of proving his claim in the bankruptcy proceeding did not constitute a waiver of his right to sue for deceit.*

This principle has been laid down in several cases that have arisen under the present Bankruptcy Act.

Katzenstein v. *Reid, Murdoch & Co.*, 41 Tex. Civ. App., 106, 91 S. W., 360 (1905), 16 Am. B. R., 740, 749.

Standard Sewing Machine Co. v. *Kattell,* 132 App. Div., 539, 22 Am. B. R., 376, 379 (1909).

In re Lewensohn, 99 Fed., 73, 74, affirmed in 104 Fed. (C. C. A.), 1006.

Standard Sewing Machine Co. v. *Alexander,* 68 S. Car., 506 (1904); 47 S. E., 711.

Frey v. *Torrey,* 70 App. Div., 166, 175 N. Y., 501, 67 N. E., 1002.

As stated by petitioners' counsel, the New York Court of Appeals expressly overruled *Frey* v. *Torrey, supra,* in *Tindle* v. *Birkett,* 183 N. Y., 267, 76 N. E., 252. They failed to state, however, that it overruled the case on only one of the two points decided. The point relied on by respondent as to *waiver* was not overruled, and that decision is still the law of New York on that point, as recognized by *Maxwell* v. *Martin,* 130 App. Div. (N. Y.), 80, 22 Am. B. R., 93, at 97, where the court said:

> "As we understand the case of *Frey* v. *Torrey,* 175 N. Y., 501, 67 N. E., 1002, it is *still authority* for the proposition that a creditor of the bankrupt does not waive his right to recover damages for false pretenses by proving his claim in the bankruptcy court."

The same was held under the Bankruptcy Act of 1867.

Strang v. *Bradner,* 114 U. S., 555, 560.

Stokes v. *Mason,* 10 R. I., 261.

McBean v. *Fox.,* 1 Ill. App., 177.

But even if Talcott waived his claim for deceit by proving a contract claim for goods sold in the bank-

ruptcy proceeding against the partnership, he certainly did not thereby waive his claim for deceit against the individual members who were not adjudicated bankrupts. (Rec., 32, 40.)

If proving a claim in bankruptcy constitutes a waiver of the fraud, then the provision of the Bankruptcy Act exempting claims for obtaining property by fraudulent representations from the operation of the discharge, is a nullity. Such an interpretation of the effect of proving a claim steeped in fraud would be a nullification of that part of the Bankruptcy Act which exempts such claims from the operation of a discharge. It would be in direct contravention of the plain language of the act and opposed to the obvious intention of Congress.

Bankruptcy Act, Sec. 17a (2).

(b) *Even if Talcott's claim had been reduced to judgment in an action of assumpsit, that would not bar this action for deceit.*

Whittier v. *Collins,* 15 R. I., 90, 2 Am. St. R., 879.

Union Central Life Ins. Co. v. *Scheidler,* 130 Ind., 214, 29 N. E., 1071, 15 L. R. A., 89.

Standard Sewing Machine Co. v. *Owings,* 140 N. C., 503, 53 S. E., 345.

Norton v. *Huxley,* 13 Gray (Mass.), 285.

Bacon v. *Moody,* 117 Ga., 207, 43 S. E., 482.

Black v. *Miller,* 75 Mich., 323, 42 N. W., 837.

The above is the rule in the state courts of the State of Illinois.

Brumbach v. *Flower,* 20 Ill. App., 219; affirmed in 131 Ill., 646.

Of course in such a proceeding for fraud the amount realized on the judgment in an action for assumpsit, should be deducted from the total amount of plaintiff's claim.

Whittier v. *Collins,* 15 R. I., 90, 2 Am. St. Rep., 879.

DISCHARGE.

(a) *The confirmation of composition did not discharge Talcott's claim for deceit.*

Even though the discharge arising by virtue of the confirmation of composition had been relied upon below, it would not be a bar to Talcott's claim for deceit. Talcott's claim was provable because it was a claim for property sold on which he might have sued in contract.

Bankruptcy Act, Sec. 63a (4).

Crawford v. *Burke,* 193 U. S., 176, 193.

It was provable "though plaintiff elected to bring his action for fraud."

Crawford v. *Burke, supra,* at p. 193.

The real test of provability is whether Talcott's claim was of such a character that he could have waived the tort and sued upon contract. If so his claim was provable and by proving it he did not lose his right to sue for the tort if the tort was of such a character as to exempt the provable claim from the discharge.

As Talcott's claim was provable it would have been discharged by the confirmation had it not been a

claim having its origin in a fraudulent representation. The Bankruptcy Act expressly excepts *liabilities for procuring property by false representations from* the operation of a confirmation of composisition (discharge).

Bankruptcy Act, Sec. 17a (2).

Of course, as stated by petitioners' counsel, prior to the amendment of the Bankruptcy Act on February 5, 1903, Talcott's claim would have been discharged so far as the partnership was concerned, because the claim based upon the fraud of obtaining property by false representations had not been reduced to judgment at the time of the bankruptcy.

Crawford v. *Burke, supra.*

But the amendment was passed before the liability arose, before the proceedings in bankruptcy were instituted, and before the confirmation order was entered. Under the amendment, liabilities (not judgments any more) for obtaining property on false representations, are excepted from the discharge.

So not even the partnership is freed from the liability to pay damages for the fraud.

Bankruptcy Act (Amendment 1903), Sec. 17a (2).

Mackel v. *Rochester,* 135 Fed., 904, 906.

Nelson v. *Petterson,* 131 Ill. App., 443, 450, affirmed in 229 Ill., 240, 82 N. E., 229.

(b) *The individual members of the partnership were not discharged from their liabilities, either individual or partnership, since they were not individually adjudged bankrupt.*

But even if it should be conceded that the dis-

charge in bankruptcy was pleaded and that it was a pertinent issue in this case, it could not aid the individual members of the partnership or affect Talcott's claim against them, as those individuals were not adjudicated bankrupts. The order of February 1, 1904, adjudicating petitioners bankrupt individually and as copartners (Rec., 32) was vacated on February 24, 1904, in so far as it adjudicated the individuals bankrupt, leaving only an adjudication of the partnership. (Rec., 40.)

A discharge proceeding is an independent proceeding necessitating the existence of jurisdictional elements the same as any original legal proceeding.

In re Walrath, 24 Am. B. R., 541.

An indispensable jurisdictional element to such a proceeding is that the party applying for it have been adjudicated a bankrupt. The petition for a discharge rests upon the *fundamental* proposition that the petitioner has been adjudicated a bankrupt.

Bankruptcy Act, Sec. 14a.
In re Clisdell, 4 Am. B. R., 95; 101 Fed., 246.
In re Mason, 3 Am. B. R., 399, 99 Fed., 256.

The partnership is a distinct entity from the individual for purposes of bankruptcy proceedings.

In re Mercur, 116 Fed. (D. C.), 655, 6589.
In re Bertenshaw, 157 Fed. (C. C. A.), 363.

That the individuals did not procure a discharge is corroborated by the fact that a discharge was not relied upon in the court below. While it was at one time pleaded in two pleas, a demurrer was sus-

tained to those pleas and they were not subsequently renewed nor was error assiggned on the lower court's ruling sustaining a demurrer to them.

A discharge procured on behalf of the partnership leaves unaffected all liabilities of the individual members.

In re Bertenshaw, 157 Fed. (C. C. A.), 363.
In re Pincus, 147 Fed., 621, 17 Am. B. R., 331.
In re Hale, 107 Fed., 432, 6 Am. B. R., 35.
In re Mercur, 116 Fed. (D. C.), 655, 658-9.
Kavanaugh v. *McIntire,* 120 App. Div. (N. Y.), 722, 112 N. Y. S., 987.

This proceeding is an action for deceit against the individuals who composed the partnership which procured the discharge, and the individuals have not shown even an adjudication in bankruptcy, to say nothing of a discharge.

In conclusion we submit that the writ should not issue, first, because no showing has been made justifying its being issued, and second, the questions raised by the record were correctly decided by the Circuit Court of Appeals.

Respectfully submitted,

HORACE KENT TENNEY,
ROGER SHERMAN,
Counsel for Respondent.

Roger Sherman
Of Counsel.

FRIEND v. TALCOTT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 155. Argued January 30, 31, 1913.—Decided April 7, 1913.

Under the Bankruptcy Act of 1898, as amended in 1903, a creditor is not bound to elect which remedy he will pursue against the bankrupt on a contract where the right to sue in tort also exists; nor does he waive his right to sue on the tort for balance of his claim by accepting his dividend under a composition. *Crawford* v. *Burke*, 195 U. S. 176.

Under the Bankruptcy Act of 1898, as amended in 1903, there are certain classes of creditors excluded from the act altogether and others who, although included therein, are excepted from the operation of the discharge. In this respect the act of 1898 differs from that of 1841, and follows that of 1867.

To constitute *res judicata* there must be identity of cause between the two cases. That identity does not exist between the granting of a general discharge in bankruptcy and an action for the balance of a debt excepted by the act from the operation of the discharge.

A creditor, after unsuccessfully opposing a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, accepted the dividend and then sued for the balance on the ground that the debt was excepted from the discharge: *Held* that there was no waiver of the right to sue on the tort by accepting the dividend, nor was the granting of the discharge *res judicata* of the claim for the balance of the debt.

179 Fed. Rep. 676, affirmed.

THE facts, which involve the right of a claimant who has accepted a dividend under a composition to recover against the bankrupt after the discharge on the ground of deceit prior to the bankruptcy, are stated in the opinion.

Mr. Chester E. Cleveland, with whom *Mr. Jacob Newman*, *Mr. Salmon O. Levinson* and *Mr. Benjamin V. Becker* were on the brief, for petitioners:

Talcott has had his day in court on the issue as to whether or not his claim is barred by the discharge of the bankrupts, and they ought not to be twice vexed with the same controversy.

The business was all partnership business; the supposed financial statement was made by the bankrupts or on behalf of them as a partnership; and their discharge in bankruptcy was as partners. *In Re Bertenshaw*, 157 Fed. Rep. 363; see dissent; *Vaccaro* v. *Security Bank*, 103 Fed. Rep. 436; *Dickas* v. *Barnes*, 140 Fed. Rep. 849; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *Re Purley & Hays*, 138 Fed. Rep. 927; *Re Forbes*, 128 Fed. Rep. 137; *Francis* v. *McNeal*, 186 Fed. Rep. 481.

The adjudication of the Bankruptcy Court cannot be said to be binding upon one part or capacity and not binding upon the other part or capacity. 24 Am. & Eng. Ency. 735 *et seq.*; *Corcoran* v. *C. & O. Canal Co.*, 94 U. S. 741, 745; *United States* v. *California Co.*, 192 U. S. 355.

The jurisdiction of the Bankruptcy Court was invoked to hear and determine whether or not the bankrupts should be denied a discharge because they had obtained property on credit by means of a materially false statement in writing, and the creditor is bound by the adjudication on that issue. *Starbuck* v. *Starbuck*, 173 N. Y. 503; *Hewitt* v. *Northrup*, 75 N. Y. 506, 510; 11 Am. & Eng. Enc. of Law, 446, 447.

While the precise cause of action set forth in the present declaration may not have been involved in the bankruptcy proceeding, nevertheless the precise issue as to the effect upon a discharge of the facts relating to the statement to the agency was involved in the bankruptcy proceeding as well as in the present action; it is therefore such a *res judicata* as is known as an estoppel by verdict. 24 Am. & Eng. Enc. of Law, 714, 780; *Southern Pac. R. R. Co.* v. *United States*, 168 U. S. 1, 48; *Stone* v. *United States*, 64 Fed. Rep. 667, 670.

The adjudication was no less conclusive because it was upon a question of law rather than upon a question of fact. *Bissel* v. *Spring Valley*, 124 U. S. 225, 232; 24 Am. & Eng. Enc. 799; *Gould* v. *Evansville R. R. Co.*, 91 U. S. 526, 533; *Nor. Pac. R. R. Co.* v. *Slaght*, 205 U. S. 122.

The conclusive effect of the adjudication is not destroyed by the fact that the decree of the Bankruptcy Court was erroneous. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510.

The record of the bankruptcy proceedings evidenced an election of remedies by respondent, which barred his suit for fraudulent representations.

By filing a claim for goods sold and thus affirming the contract, respondent waived all claims for deceit. *Tindle* v. *Birkett*, 205 U. S. 183; *Adler* v. *Fenton*, 24 How. 407; *Lincoln* v. *Claflin*, 7 Wall. 132; *Simon* v. *Goodyear Co.*, 105 Fed. Rep. 573.

The judgment of the Bankruptcy Court allowing his claim for goods sold, operated as a merger of all his causes of action.

A judgment merges not only the cause of action sued on but all concurrent remedies, even if consistent. *Barth* v. *Loeffelholtz*, 108 Wisconsin, 562; *Caylus* v. *N. Y., K. & S. R. R. Co.*, 76 N. Y. 609; *Bowen* v. *Mandeville*, 95 N. Y. 237; *Morgan* v. *Skidmore*, 3 Abb. N. Cas. (N. Y.) 92; *Brumbach* v. *Flower*, 20 Ill. App. 219.

The order of a court of bankruptcy allowing a claim is a judgment. *Kuehling* v. *Leberman*, 2 Wkly. N. C. (Pa.) 616; *Mitchell* v. *Mayo*, 16 Illinois, 83; *Wheeler* v. *Dawson*, 63 Illinois, 54. The fact that such judgment is not as efficient as another remedy might be, does not change the rule. *Karr* v. *Barstow*, 24 Illinois, * 580.

One appearing in the bankruptcy proceedings and opposing the discharge elects to treat his claim as one not excepted from the operation of the discharge.

The order confirming the composition discharged the bankrupts from Talcott's claim. Talcott's claim was provable. *Crawford* v. *Burke*, 195 U. S. 176. It is not excepted from the operation of a discharge. *Tindle* v. *Birkett*, 205 U. S. 183.

The confirmation of a composition has the same effect as a discharge. Bankruptcy Act 1898, § 14c.

Mr. Albert M. Kales, with whom *Mr. Horace Kent Tenney* and *Mr. Roger Sherman* were on the brief, for respondent:

The confirmation of the composition is no bar to the present suit.

There is no estoppel by judgment.

The two causes are not the same.

There must be identity of parties, subject-matter and cause of action. *Markley* v. *People*. 171 Illinois, 260; *Wright* v. *Griffey*, 147 Illinois, 496.

The subject-matter of the two proceedings is different. *Re Mussey*, 99 Fed. Rep. 71.

In the bankruptcy case the rights of the debtors to a discharge are involved. In the present suit, the right of Talcott to recover damages is involved.

Identity in interest of the parties is also wanting.

There is no estoppel by verdict. *Riverside Co.* v. *Townshend*, 120 Illinois, 9; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1.

A judgment rendered upon demurrer is sometimes conclusive of the facts confessed by the demurrer. *Bissel* v. *Spring Valley*, 124 U. S. 225.

Talcott's cause of action was therefore established in the Bankruptcy Court. *Re Thomas*, 92 Fed. Rep. 913.

The order of discharge was a mere official form. Official Form No. 62, Collier on Bankruptcy (9th ed.), p. 1160.

One who has a claim that is not dischargeable will not be heard to object to a discharge. *In re Servis*, 140 Fed. Rep. 222.

The finding of the court in the order of discharge that the bankrupts had not done any act barring a discharge, not being supported by evidence, is not binding. *Burleigh* v. *Foreman*, 12 Am. B. R. 88; 3 Cyc. 362.

The burden of proof is on him who claims an estoppel by verdict. The burden has not been sustained by the defendant. *Russell* v. *Place*, 94 U. S. 606; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385, 400; *Cromwell* v. *Sac County*, 94 U. S. 351; *Southern Co.* v. *St. Paul Co.*, 55 Fed. Rep. 690; *Enfield* v. *Jordan*, 119 U. S. 680, 691.

A misrepresentation to a third person is as effectual as a basis for an action of deceit as a direct representation to the one who is deceived. *Katzenstein* v. *Reid*, 41 Tex. Civ. App. 106.

If the record leaves it uncertain whether the judgment in the first case was based on a fact essential to plaintiff's recovery in the second case, there is no estoppel. *Hudson* v. *Remington Paper Co.*, 71 Kansas, 300, 304.

Proving a claim in the Bankruptcy Court or taking judgment in assumpsit does not waive the claimant's right to sue for deceit. *Katzenstein v. Reid, supra; Standard Sewing Machine Co.* v. *Kattel*, 132 App. Div. (N. Y.) 539; *In re Lewensohn*, 99 Fed. Rep. 73, 74, aff'd 104 Fed. Rep. 1006; *Standard Sewing Machine Co.* v. *Alexander*, 68 S. Car. 506; *Frey* v. *Torrey*, 70 App. Div. (N. Y.) 166; *S. C.*, 175 N. Y. 501; *Mallory* v. *Leach*, 35 Vermont, 156; *Bowen* v. *Mandeville*, 95 N. Y. 237; *Sheldon* v. *Clews*, 13 Abb. (N. C.) 41; *Whittier* v. *Collins*, 15 R. I. 90; *Union Cent. Life Ins. Co.* v. *Scheidler*, 130 Indiana, 214; *Standard Sewing Machine Co.* v. *Owings*, 140 N. Car. 503; *Norton* v. *Huxley*, 13 Gray (Mass.), 285; *Brumbach* v. *Flower*, 20 Ill. App. 219, aff'd 131 Illinois, 646; *Bacon*

v. *Moody*, 117 Georgia, 207; *Drainage District* v. *Dowd*, 134 Ill. App. 499.

The same was held under the Bankruptcy Act of 1867. *Strang* v. *Bradner*, 114 U. S. 555, 560; *Stokes* v. *Mason*, 10 R. I. 261; *McBean* v. *Fox*, 1 Ill. App. 177.

The decision in the case of *Frey* v. *Torrey*, *supra*, is not affected by subsequent decisions. *Tindle* v. *Birkett*, 183 N. Y. 267; *Maxwell* v. *Martin*, 130 App. Div. (N. Y.) 80; *Crawford* v. *Burke*, 195 U. S. 176; *Tindle* v. *Birkett*, 205 U. S. 183.

There is no inconsistency between a suit in assumpsit based on a contract, and an action for deceit for false representations in inducing the making of the contract. *Bowen* v. *Mandeville*, 95 N. Y. 237; *Siltz* v. *Springer*, 236 Illinois, 276; *Mallory* v. *Leach*, 35 Vermont, 156.

Filing a claim in the Bankruptcy Court and having it allowed does not effect a merger with a claim for deceit in obtaining the property by false representations.

Those who have claims not released by a discharge, are not "parties in interest." Collier on Bankruptcy (9th ed.), p. 262; *In re Servis*, 140 Fed. Rep. 222.

The confirmation of composition did not discharge Talcott's claim for deceit.

The Bankruptcy Act expressly excepts liabilities for procuring property by false representations from the effect of a discharge. Bankruptcy Act, § 17*a* (2).

Before the amendment, the act excepted from discharges only judgments based on false representations. *Crawford* v. *Burke*, 195 U. S. 176.

A discharge does not release liabilities arising out of deceit or any tort excepted by the statute. *In re Lewensohn*, 99 Fed. Rep. 73; *Taylor* v. *Farmer*, 81 Kentucky, 458; *Turner* v. *Atwood*, 124 Massachusetts, 411; *Nelson* v. *Petterson*, 131 Ill. App. 443, 450, aff'd in 229 Illinois, 240; 82 N. E. Rep. 229; *Katzenstein* v. *Reid*, *supra*.

One holding a judgment that is not dischargeable under the act may oppose a discharge and still recover on the judgment. *Tinker* v. *Colwell*, 193 U. S. 473; *Audubon* v. *Shufeldt*, 181 U. S. 575.

The proper practice is to grant a discharge and try the question whether a given claim is barred by the discharge when a suit is commenced on such claim. Collier on Bankruptcy (9th ed.), p. 311; *In re Rhutassel*, 96 Fed. Rep. 597; *In re Thomas*, 92 Fed. Rep. 912; *In re Tinker*, 99 Fed. Rep. 79.

Sections 14 and 17 are not in conflict. Under them a creditor has two rights, first, to prevent a discharge, and, second, to recover for the fraud practiced on him.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On February 1, 1904, the commercial firm of Friend, Moss & Morris, and its members, were adjudicated bankrupts. As the issues here to be considered are unaffected thereby and the subject was treated as irrelevant by the courts below and no question concerning it is insisted on by the respondent, we put out of view an order subsequently made setting aside the adjudication as to the members of the firm individually.

Talcott, the respondent, was allowed a claim for $3,204.91, the unpaid price of goods sold to the firm on credit. The firm, availing of the right to make a composition with its creditors, given by §§ 12 and 13 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 549, asked the court to approve a proposed composition. Talcott, among others, opposed, upon the ground that the bankrupt had procured the sale on credit of the goods, the price of which formed the basis of his (Talcott's) allowed claim, by means of false reports made to a commercial agency of the financial condition of the firm. The

specification of the grounds of objection just stated is reproduced in the margin.[1]

Before a master the bankrupt contended that the objection of Talcott was insufficient because even if the facts were true they were inadequate to prevent the approval of the composition. The master, accepting that view, without taking testimony, reported in favor of approval. The report on the subject was as follows:

"As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of section 14*b* (3) would require the 'materially false statements in writing' to be made directly to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a commercial agency to be in-

[1] That said bankrupts obtained from said James Talcott and from other creditors property upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining such property upon credit; that said statement was so made on or about the 21st day of January, 1903, to Woods Dry Goods Commercial Agency, which, as said bankrupts knew, was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to be communicated to those from whom they sought such credit; that said statement was duly communicated to said James Talcott and to others by said Commercial Agency for the purpose of being acted upon by them in selling goods to said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon said statement; that by the statement so made in writing by said bankrupts it was averred that they had a net surplus on January 1st, 1903, of ninety-two thousand nine hundred and eighty-eight and 95–100 dollars over and above all debts and liabilities, whereas, in truth and in fact, they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time said statement was made, but were not known to said James Talcott and other creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition in bankruptcy herein.

sufficient, and I am of the opinion that the specification should be overruled for this reason."

This report was objected to by Talcott on the ground that the master erred in refusing to take proof as to the alleged false statements and in treating them as legally insufficient. The objections were overruled and the report was confirmed. The order of confirmation, following the requirements of paragraph *d* of § 12 (30 Stat. 550), recited that the composition was "for the best interest of the creditors," and "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge." The result was to give the bankrupt a general discharge in virtue of subdivision *c* of § 14 (30 Stat. 550), which says: "The confirmation of the composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

In April, 1905—about a year after the composition—Talcott commenced this action to recover from the former bankrupt firm the damages suffered by him because of deceit practiced in procuring the sale of goods on credit. The deceit relied upon was the deceit which had been alleged as a basis for the opposition to the composition, that is, false reports made in writing to a commercial agency as to the financial condition of the firm, except that in one count no mention was made of the commercial agency. On the face of the declaration the sales asserted to have been made were the same sales the price of which formed the basis of the claim filed and allowed, and if not accurately, at least approximately the amount of the damage sought to be recovered was the difference between the aggregate price of such sales diminished by the extent of the distribution paid upon the composition. In addition to the general issue the defendants set up as *res judicata* the order arising from confirmation of the com-

position. The cause was heard upon the issue of former adjudication, and judgment was entered in favor of the defendants, the judgment reciting that the matters and things involved in the suit had been fully adjudicated in the bankruptcy proceedings. On reviewing the cause the Circuit Court of Appeals concluded that the act of Talcott in going into the bankruptcy proceedings and proving his claim as one on contract did not constitute an election by him to be bound by the discharge if otherwise under the Bankruptcy Act the claim was excepted from such discharge, and that the fact of participating in the bankruptcy proceeding for the purpose of obtaining the benefits of the distribution therein made was not a waiver by Talcott of his right to proceed in an action for deceit to collect the deficiency notwithstanding the discharge. The court, moreover, decided that the opposition to the composition, its confirmation and the resulting general discharge did not constitute the thing adjudged, estopping Talcott from asserting that his claim for damages suffered by the deceit was not embraced by the discharge.

The judgment of the trial court was therefore reversed—179 Fed. Rep. 676—and the case is here on the allowance of a certiorari.

There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*. In doing so we shall direct our attention to four propositions taken from one of the printed arguments on behalf of the petitioners and which we think embrace all the contentions relied upon. The propositions are these:

1. The record of the bankruptcy proceedings evidenced

an election of remedies by respondent which barred his suit for fraudulent representations.

2. The order confirming the composition discharged petitioners from respondent's claim.

3. The order confirming the composition was a complete adjudication against respondent's right of action.

4. Neither the reasons assigned by the District Court for holding respondent's specifications insufficient, nor such holding itself, detract from the legal efficacy of the order confirming the composition as an adjudication of the rights of the parties.

At the outset it is to be observed that the propositions are redundant since they really involve only two distinct contentions: first, election and resulting waiver from the proof by Talcott of his claim in bankruptcy and his participation in the distribution arising from the composition, and second, the binding force of the discharge on the claim of Talcott, because of the force of the thing adjudged resulting from the order approving the composition over the objection of Talcott and the general statutory discharge which resulted.

Coming to dispose of the first contention, we put out of view as irrelevant much that is urged in argument concerning what constitutes an election and waiver in the general sense, since the question here for decision is only whether there was a waiver or election under and for the purposes of the bankrupt law.

The theory of election and waiver arising from the proof of the claim in bankruptcy as one upon contract where the right to sue in tort also existed must rest upon the assumption that it was within the power of the creditor to exercise an election to come under the operation of the bankruptcy proceedings and thus to be bound by the result of such proceedings or to stay out and escape the operation of the act. This must be the case, as it is impossible to conceive of a right of election in a case where

no such right existed. But this theory has been expressly decided to be without foundation. *Crawford* v. *Burke*, 195 U. S. 176. In that case the ruling was that where a debt was of such a character as to cause it to be within the power of the creditor to enforce the same as an obligation arising on contract or if he chose to do so as one in tort, as from the point of view of contract the debt was provable in bankruptcy, even conceding that it might not be so provable if the tort was relied upon, that it was the duty of the creditor to prove as under contract, and if he abstained from so doing his debt or claim being provable was operated upon and barred by the proceedings. The theory of election and waiver being thus established to be unreal, there is of course nothing left for the proposition to rest upon. But it is said *Crawford* v. *Burke* is inapposite because in that case although the claim under consideration involved both the elements of contract and tort, as no judgment had been entered establishing the tort, under the bankrupt law as then existing the debt was not excepted from a discharge, while here, in consequence of the amendment of 1903, the debt if there has been no waiver is excepted from the discharge. This being the case it is urged that an election and waiver resulted from the act of the debtor in proving his claim as on contract and thus taking advantage of the bankruptcy proceedings and thereby obtaining rights or benefits which he would not have had if he had stayed out and thus saved his right to be freed from the operation of the discharge. But this distinction is also wholly without foundation. Its error lies in assuming that the right which the bankrupt act confers upon enumerated classes of debts to be exempt from the operation of a discharge rests upon the conception that such debts are exempt because they are excluded from the act and may not participate in the distribution of assets. That is to say, the confusion lies in not distinguishing between creditors who are ex-

cluded from the bankrupt act and those who although included therein have had conferred upon them the benefit of an exception from the operation of the discharge. Even a superficial analysis of the text of the Bankruptcy Act will make this clear. Thus § 63*a* and *b* (30 Stat. 562) enumerates the debts which may be proved and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge. Section 17 (30 Stat. 550) enumerates the debts not affected by a discharge, that is, those exempted from its operation. It is apparent that the exemptions do not rest upon any theory of the exclusion of the creditor from the bankrupt act or of deprivation of right to participate in the distribution, but solely on the ground that although such rights are enjoyed, an exemption from the effect of the discharge is superadded. The text leaves no room for any other view, since the exceptions in terms are accorded to certain classes of debts which are provable under § 63, and therefore debts which are entitled to participate in the distribution, the language being: "A discharge in bankruptcy shall release a bankrupt from all of his *provable* debts, except such as," etc.

And a brief reference to the more important of the prior bankruptcy acts throws abundant light on the text. The Bankruptcy Act of August 19, 1841, c. 9, 5 Stat. 440, in the first section comprehensively stated the classes of claims which were embraced within its scope and expressly excluded certain enumerated classes. No exemption from the operation of a discharge when granted was conferred, and therefore all who were within the scope of the act, while enjoying its benefits, were bound by its burdens. Under this act, in *Chapman* v. *Forsyth*, 2 How. 202, it was held that although a claim was excluded from the law if brought in by the voluntary act of the creditor and he thereby participated in the distribution, the creditor by such election waived his right to

be treated as not bound by the statute, and consequently the debt or claim was discharged. The Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 517, presumably to correct the injustice which arose from excluding from all participation in the distribution of assets those creditors whom it was thought because of the meritorious nature of their debt should not be bound by the discharge, departed from the system of excluding such creditors from the act and on the contrary adopted the principle of including them in the benefits of the act and yet at the same time exempting them from the operation of the discharge. To accomplish this result, § 19 of the act (14 Stat. 525) made a most comprehensive enumeration of provable debts, including as well unliquidated damages for torts as for breaches of contracts. Those things which in the act of 1841 were stated to be excluded from the operation of the act were embodied in a particular section (§ 33, 14 Stat. 333) dealing with exemptions from discharge, and to avoid all possible misconception the section provided " . . . but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." It is obvious that the present act embodies the same policy, since the exemptions from discharge which are given by the statute are found in a section devoted to that subject and are stated in words, as we have said, to be exemptions from discharge allowed in favor of provable debts, that is, debts entitled to participate which are given the benefit of an exemption from the operation of the discharge.

While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata*, that is, a confusion of thought arising from treating things which are different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of

the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (§ 14*c*, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, "those not affected by a discharge." It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition.

Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval

of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to the statute as to the absence of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation.

Affirmed.